163 U.S. 711

163-711

EXTRACTS FROM TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 708.

JOHN K. WHITE, PLAINTIFF IN ERROR,

vs.

NICHOLAS LENNIG AND JOHN B. LENNIG, EXECUTORS OF CHARLES LENNIG, DECEASED.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

RECORD FILED AUGUST 20, 1895.

(15,998.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 12, 1895.

(Record, page 15.)

Complainant's Bill.

To the Hon. William McLaughlin, judge of the circuit court of Rockingham county:

The bill of complaint of John K. White respectfully represents that by patent bearing date the 5th day of March, 1796, *their* was granted to John Barclay, in his own right for one moiety and as assignee of Matthew Gambill for the other moiety, a tract of ninety-three thousand acres of land lying partly in the county of Rockingham, in the State of Virginia, and partly in the county of Pendleton, now in the State of West Virginia, but formerly also in the State of Virginia; that the said John Barclay was a resident of the city of Philadelphia, and departed this life a number of years ago intestate, leaving the following children and heirs-at-law, to wit, John M. Barclay, James J. Barclay, Mary, who intermarried with Clement C. Biddle, and four other daughters, to wit, Harriet, Charlott, Jane, and Sophia Barclay, all of whom died unmarried, intestate, and without issue, the last two dying in infancy; that the said John M. Barclay has also departed this life intestate, leaving the following children and heirs-at-law, to wit, John O. Barclay, Clement B. Barclay, James Barclay, C. Francis Barclay, Annie, who intermarried with Edward Trenchard, and Mary, who intermarried with Dudley Diggs, C. B. Smith.

Amended. J. E. R.

That of these children John O. Barclay is dead intestate, leaving as his children and heirs-at-law Mortimer Barclay and Christine, who intermarried with Dr. Stuppen Wallace, and who, together with her husband, is dead intestate, leaving an only child and daughter, Christine Wallace, as her heir-at-law; that Edward Trenchard and Annie, his wife, are dead, leaving Edward Trenchard as their only heir-at-law; that James J. Barclay died a few years ago, leaving a will with sundry codicils annexed thereto, under which he devised all of the residue of his estate, real and personal, which devise included necessarily the interest of said decedent in the tract of land aforesaid to Anna Clifford Biddle, Harriet Biddle, Elizabeth Rebecca Biddle, and Caroline Biddle, the daughters of a nephew of the testator, John B. Biddle, who will be spoken of hereinafter. A copy of said will and codicils and of the order for the probate thereof will be filed with this bill temporarily, the purpose being to have the same admitted to record in this State and to file a copy of the same, together with a copy of the order admitting the said will and codicils to probate here. When filed, the same will be marked Exhibit "A" and will be prayed to be read as part of this bill; that the said Mary Biddle and her husband, Clement C. Biddle, are both dead some years ago, leaving as their children and heirs-at-law three boys, to wit, John Barclay Biddle, Chapman Biddle, and George W. Biddle; that the

said John Barclay Biddle hath also departed this life, leaving a will, under which, as your complainant is informed and believes, he attempted to devise certain estate, including his interest in the tract of land aforesaid, to his wife, Caroline Biddle. This will, as your complainant avers and charges, is of no validity so far — the interest of testator in the tract of land aforesaid is concerned, not having beeen executed in accordance with the laws of the State of Virginia, so that upon the death of said decedent the said interest descended to his children and heirs-at-law, to wit, Anna Clifford, who has intermarried with Clelent Phillips; Harriet, who has intermarried with De Grasse Fox; Elizabeth B., who has intermarried with Dr. Samuel Miller, Caroline Biddle, William P. Biddle, and Dr. Clemens Biddle; that the said Chapman Biddle hath also departed this life, leaving a will under which he devised all of his interest in said tract of land to his wife, Mary L. C. Biddle; that by deed bearing date the 8th day of May, 1890, from De Grasse Fox and Harriet Biddle, his wife, which has been duly admitted to record in the clerk'- office of the county court of Rockingham county, your complainant is the owner of an undivided interest of one-ninth in said tract, and is desirous of having a partition of the same in kind, if that can be made with due regard to the interests of all concerned, and, if this be not practicable, of having a sale of said lands, or at least that portion of the same as lies in the State of Virginia, and a distribution of the proceeds of sale; that your complainant finds, however, that by an agreement dated the 6th day of March, 1890, one Charles Lenning has undertaken to sell and convey to the J. P. Houck Tanning Company, a corporation under the laws of the State of Virginia, upon certain terms and conditions, all the tan-bark to be found in and upon said tract of land, and the said company, through its agents and employees, has entered upon the same and is now actively engaged in cutting down the chestnut trees and other growing timber upon said tract of land from which said tan-bark can be procured, and, unless restrained by the court, will utterly destroy said timber, to the irreparable damage of the freehold. An attested copy of said agreement, taken from the record of said county, is filed herewith, marked Exhibit "B," and is prayed to be read as part of this bill; that from the agreement it appears *from* the contract as to the sale of the right to cut and carry away said tan-bark was originally with J. P. Houck and J. C. Steigle, who assigned their interest in the same to England & Bryan, who in turn assigned the same to the said company; that the said Lenning in said agreement *in said agreement* professes to have acquired said tract of land from the heirs of Augustus Waterman, dec'd, and, tracing this claim of title, your complainant finds it is derived through Augustus Waterman and the heirs of Asher Waterman, dec'd, by deeds with covenants of special warranty only from Henry J. Gambill, who bought the whole of said tract of land for the sum of eight dollars and nine cents from Joseph Scott, marshal of the district of Virginia, under a sale made of the same as the property of John Berkeley, noy Barclay, as delinquent for the non-payment of the United

States direct land tax, and received a deed therefor; that, as your complainant is informed and believes, these tax sales and deeds have been held to be illegal and invalid so often and so uniformly by the court as scarcely to constitute them sufficiently strong to make even a color *a* title to any lands referred to in them; that as, he avers in this case, the sale and deed aforesaid were had and made without the formalities required by law as the property of John Berkeley, not Barclay, under a law itself unconstitutional and void, the same and all deeds made in pursuance of and under said sale and deed must be set aside, cancelled, and annulled. These deeds are as follows, to wit: Deed from Joseph Scott, marshal, to H. J. Gambill, dated 1st day of June, 1806, and recorded December, 1806; 2nd, deed from H. J. Gambill and wife to Asher Waterman, dated December 16th, 1806, recorded December 16th, 1806; 3rd, deed from Asher Waterman's heirs to Augustus Waterman, dated June 8th, 1827, recorded June 8th, 1827; 4th, deed from Augustus Waterman's devisees to Charles Lenning, dated July 9th, 1859, recorded July 9th, 1859. All of these deeds are deeds of special warranty only; that in addition to the claims asserted to said tract of land under said deeds and under the agreement aforesaid with "the J. P. Houck Tanning Company," your complainant finds that the corporation known as "the Royal Land Company of Virginia" has placed upon record a deed of trust or mortgage bearing date the 2nd day of October, 1876, and recorded on the 20 of January, 1877, under which it professes to convey said tract of land as the owner thereof to the Fidelity Trust, Insurance and Safe Deposit Company of Philadelphia, also a corporation, in trust to secure certain bonded debts of said Royal Land Company. He also finds an agreement of record between Charles Lennig and the Potomac and Ohio Railroad Company, a corporation, dated April 20th, 1881, and recorded on the 1st day of September, 1882; also an agreement between Charles Lenning and R. N. Pool, dated June 27th, 1883, and recorded on the 3rd of March, 1885, under which certain interests in the title of the said Lennig are conveyed to the said Pool; also a contract between R. N. Pool and James Boyce, dated February 27th, 1885, and recorded on the 30th of March, 1885, under which the said R. N. Pool conveyed to the said James Boyce an undivided moiety of his rights under his contract with the said Charles Lenning; and a further contract between the said R. N. Pool and Samuel E. Griscom, dated the 1st day of September, 1888, and recorded on the 6th of January, 1890, under which the said Pool conveyed to the said Griscom all interest then owned by him in the Lenning tract, among others; that your complainant also finds that Asher Waterman and Augustus Waterman, while they were alive, made some quitclaim deeds to small portions of said tract, but by whom these are now owned your complainant is unable to state, and he proposes to bring these claimants before the court by amended bill, if the same be deemed necessary or advisable. Wherefore, being remediless, save in equity, where matters of this sort are alone and properly cognizable, your complainant prays that Clement B. Barclay, James Barclay, C. Francis Barclay,

Mortimer Barclay, Christine Wallace, Edward Trenchard, Dudley Diggs (Smith) and Mary, his wife, formerly Mary Barclay; Clement Phillips and Anna C., his wife, formerly Annie Clifford Biddle; De Grasse Fox and Harriet B., his wife, formerly Harriet Biddle; Dr. Samuel Miller and Elizabeth, his wife, formerly Elizabeth Rebecca Biddle; William O. Biddle and Dr. Clement Biddle, George W. Biddle, Mary L. C. Biddle, widow of Chapman Biddle, dec'd; Charles Lenning, J. P. Houck, *H*ohn C. Steigle, Thomas Y. England, Edward A. Bryan and Charles S. Walton, partners in trade under the firm name and style of England & Bryan; The J. P. Houck Tanning Company, a corporation; The Royal Land Company of Virginia, a corporation; The Fidelity Trust, Insurance and Safe Deposit Company, a corporation; The Potomac & Ohio Railroad Company, a corporation; R. N. Pool, James Boyce, and Samuel E. Griscom may be made parties defendant and be required to answer, answer under oath being expressly waived; that The J. P. Houck Tanning Company, its agents and employees and all other persons, may be enjoined and restrained from cutting any trees of any sort growing in and upon said tract of land for the purpose of peeling the bark therefrom or for any other purpose, and from removing any timber of any sort already cut or any bark already peeled, until the future order of the court; that the court may take cognizance of the various questions presented in this bill affecting the legal title to said tract of land, and that after these are determined that there may be a partition of the same *in*, if practicable, and, if not practicable, that there may be a sale of the same and a distribution of the proceeds of sale, and that such further and other relief may be given as the nature of the case may require and to equity seem meet. May process issue, and your complainant will ever pray, &c.

JOHN K. WHITE.

VIRGINIA,
Rockingham County, } *To wit:*

This day John K. White, whose signature is attached to the foregoing bill, made oath in person before me, in my county aforesaid, that the matters set forth therein, so far as made upon his own knowledge, are true, and so far as made upon information derived from others he believes them to be true.

Given under my hand this 21st day of May, 1890.

D. H. LEE MARTZ, *N. P.*

* * * * * * *

(Record, page 42.)

Answer of Lennig's Ex'ors.

The answer of Nicholas Lennig and John B. Lennig, executors of Chas. Lennig, dec'd, to a bill in chancery filed against them and others in the circuit court of Rockingham county, Virginia, by John K. White, and therein pending in the name of John K. White *vs.* Clement B. Barclay, &c.

These respondents, not waiving their demurrer, but insisting thereon, as well as to every other exception that can or may be taken to said bill, proceeding to answer the same so far as they are advised it is necessary for them, answering, say it is true that there was by patent, dated March 5th, 1796, granted to John Barclay by the governor of Virginia the tract of land of 93,000 acres lying partly in the county of Rockingham and partly in what is now Pendleton county, West Virginia, but formerly a part of ths State. Respondents suppose that it is true that the said John Barclay is dead long ago, but whether or not the persons named in the bill are the heirs of the said John Barclay respondents do not know, and this they neither admit nor deny; but respondents do deny that either the said John Barclay or any of his heirs are entitled to any right, title, or interest in the land in the said bill mentioned; on the contrary, respondents say that they are the owners of a large portion of the said tract, as will more full appear. It is true that respondents' testator, Charles Lennig, did make the contract with Houck & Steigle by which he sold to them the right to cut and remove bark, &c., and Complainant's Exhibit B is believed to be a true copy of that agreement; and respondents aver that the said testator had a perfect right and full power to make said contract and agreement; that the said Charles Lennig bought the said land from W. H. Ruffner and others, devisees of Augustus Waterman, in 1859, and on the — day of July, 1859, received a deed therefor, which was on that date duly recorded in the office of the clerk of the county court of Rockingham county, Va., a copy of which is here filed, marked "Ex. 1," and prayed to be read as part hereof; a copy of the will of Augustus Waterman is here filed, marked "W," & prayed — read as a part hereof; that the said Augustus Waterman derived title to the said land through the will and deed from the heirs of Asher Waterman, his father, as will appear by copies of will and deed here filed and marked "Ex. 2" and "Ex. 3" and prayed to be read as part hereof; that the said Asher Waterman derived his title through H. J. Gambill by deed of date Dec. 16th, 1806, as will more fully appear by copy of said deed here marked "Ex. 4" and prayed to be read as part hereof, and said Gambill by deed from John Scott, marshal*l* of the district of Virginia, of date Jan'y 6th, 1806, as will more fully appear by "Ex. 5," which is prayed to be read as part hereof, said land being sold in pursuance of law by said John Scott, marshal*l*, for the non-payment of the delinquent taxes assessed against the said John Barclay by the United States Government, known as the "United States *district*

tax;" and respondent- says that all of the provisions and requirements of the act of Congress of the United States under which the land was sold was fully complied with; and respondents, further answering, say that their testator and those through whom he claimed have been in undisputed actual possession and ownership of the said land for nearly a century under and by virtue of the said conveyances, &c.; that no one has ever questioned the validity of their title until this suit was brought, and there is no just ground for it now; that for nearly a century they have had open, notorious possession, adverse to the complainants and the rest of the world: that they have paid all of the taxes assessed against the land since 1806; have sold many smaller tracts off of the original tract and put the purchasers in possession; that deeds of conveyances *where* duly executed and recorded, and that the purchasers have since their purchases been in undisputed, open, notorious, and continuous adversary possession under and by virtue of said conveyances for a great many years—for more than the statutory period. They have from time to time had tenants on the land to watch over it, care for it, and prevent depredations; have leased portions of the land and received rent therefor, and in fact have in every way exercised such open, notorious acts of ownership and continued adversary possession as the lands from its character and quantity it was capable of. Respondents deny that the said John Barclay or those claiming under him have ever had actual possession of any part of this land now sought to be taken from the estate of respondents' testator.

Respondents further say that in addition to the title for delinquent U. S. direct tax for which the land was sold by John Scott, marshal of the district of Virginia, the said John Barclay also forfeited his title to the said land by failure to pay taxes due the Commonwealth of Virginia, as respondent- will be able to show from the auditor's books of this State, and that the said John Barclay nor any one for him ever redeemed the lands after they were forfeited, so that the chain of title claimed by the complainants from the Commonwealth of Virginia is broken and forfeited, and he has no title whatever. Respondents further say that the land has not been assessed to the said John Barclay or his heirs on the assessor's books of this county since the year 1806; that the complainants and those under whom they claim have not at any time had the property placed upon the land books of this county or of Pendleton county and assessed for taxes and paid the taxes thereon, as required by law to be done by persons claiming to own lands which has been dropped from the land books of this Commonwealth. Respondents deny that the said complainant is the *bona fide* purchaser of the interest which he seeks to recover in this cause and charges that the bringing of the suit in his name is but a subterfuge to avoid the payment of the tax which the State imposes and requires to be paid before redemption, and for the purpose of seeking to acquire some fancied advantage by bringing the suit in his name, instead of in the name of some of the legal heirs of John Barclay. Respondents deny that the complainant has any right to

the land, and deny that he is entitled to a partition or sale of the land, and charge that the bill was framed as for a partition among those entitled to the land and prayer for partition made, hoping by that manner of presenting his cause to avoid an action of ejectment, which is his only proper action, and an action which he knew he could not sustain in view of the facts in connection with the property. Respondents insist that the complainant has no lawful right whatever to the said land or any part thereof, but that respondents are seized and possessed thereof by good, stable, and indefeasible title and right. The respondents further say that the title of the said John Barclay to the said land passed to and was conveyed to H. J. Gambill by John Scott, marshal of the district of Virginia, by his deed bearing date Jan'y 6th, 1806. Moreover, any title or interest held by the said John Barclay in and to said land was forfeited to the Commonwealth of Virginia by his failure to pay the taxes lawfully assessed thereon by and to the *the* said Commonwealth of Virginia; that neither the said John Barclay or any one for him has ever redeemed the said land; that the respondents' testator and those under whom he claims after said forfeiture by the said John Barclay and the expiration of the time in which he was allowed to redeem located said land and have ever since paid the taxes due the Commonwealth of Virginia; that the respondents' testator and those under whom he claimed have since paid said taxes as owners of said land; and now, having answered as fully as they are advised it is necessary for them, respondents pray to be hence dismissed with their reasonable costs in this behalf so unjustly expended; and, as in duty bound, they will ever pray, &c.

NICHOLAS LENNIG,
JOHN B. LENNIG,
By Counsel.

CONRAD & CONRAD AND
GRANVILLE EASTHAM,
For Respondents.

* * * * * * *

(Record, page 152.)

Decree Octo. Term, 1892.

This cause came on to be further heard this 31st day of October, 1892, upon the papers heretofore read, proceedings had—that is to say, upon the bill of complaint, the answer of Nicholas Lennig and Charles B. Lennig, executors of Charles Lennig, dec'd; Houck & Steigle, England and Bryan, and J. P. Houck Tanning Company, the general replications to said answers and former order and decrees, and upon examination of witnesses, the affidavits and exhibits filed, and arguments of counsel; upon consideration whereof the court doth adjudge, order, and decree that the complainant and others claiming under the original patent to John Barclay and under the title which has descended to some of them as his heirs-at-

law and under the devises and conveyances made to others from some others of said heirs-at-law are the rightful owners of the tract of ninety-three thousand acres of land in the bill and proceedings mentioned and described; that they be quieted in their possession and ownership of the same; that the deeds and contracts set forth and referred to in said bill of complaint, to wit, the deed from Joseph Scott, marshall, to Henry J. Gambill, dated the 1st day of January, 1806, and recorded December; the deed from H. J. Gambill and wife to Asher Waterman, 1806, dated the 16th of December, 1806, and recorded on the same day; the deed from Asher Waterman's heirs to Augustus Waterman, dated the 28th of June, 1827, and recorded the same day; the deed from Augustus Waterman's devisees to Charles Lennig, dated the 9th of July, 1859, and recorded on the same day; the agreement between Charles Lennig, the J. P. Houck Tanning Company, Houck & Steigle, and England and Bryan, dated the 6th of March, 1890, and recorded on the 22nd of March, 1890; the agreement between Charles Lennig and Richard N. Pool, dated 27th day of June, 1883, and recorded on the 3rd of March, 1865; the deed of trust or mortgage from the Royal Land Company of Virginia to the Fidelity Trust, Insurance and Safe Deposit Company of Philadelphia, dated the 2nd day of October, 1876, and recorded on the 2nd of January, 1877; the agreement between Charles Lennig and the Potomac and Ohio Railroad Company, dated the 20th of April, 1881, and recorded on the 1st day of September, 1882; the agreement between Richard N. Pool and James Boyce, dated the 27th of February, 1885, and recorded on the 3rd day of March, 1885, and the agreement between Richard N. Pool and Samuel C. Griscom, dated the 1st day of September, 1888, and recorded on the 6th of January, 1890, be cancelled, vacated, and annulled in so far as they relate to or have any connection whatever with the title to said tract of ninety-three thousand acres of land, and the clerk of this court is directed to certify a copy of this decree to the clerk of the county court of this county for recordation in the deed books of said county, and to be indexed in the name of the parties to this cause, complainant and defendants; that the defendants, The J. P. Houck Tanning Company and Nicholas Lennig and John B. Lennig, executors of Charles Lennig, dec'd, their agents and employés, and all persons claiming under them, be perpetually enjoined and restrained from interfering with the possession and ownership of those who are hereinbefore declared to be the rightful owners of said land, and especially from cutting any trees of any sort growing in and upon said tract for the purpose of peeling bark therefrom or for any other purpose, and from removing any timber of any sort already cut or any bark already peeled.

And the executors of Charles Lennig, dec'd, through their counsel, not desiring any account to be taken of taxes paid and waste committed upon said land, the court directs that no such account be made; but for reasons appearing to the court it is further adjudged, ordered, and decreed that this cause be referred to a master commissioner of this court with instructions to enquire and report

how much and what portion of the said tract of land have been lost to the owners there by adverse possession claimed and held by parties other than those now before the court, and how much and what portions thereof are still the property of said owners, to which a good title could be made in the event of a decree for the sale thereof for the purpose of making partition, who are the owners of the Barclay survey, and whether they are all before the court in this cause, and at the same time to take an account of the amount that is due from the J. P. Houck Tanning Company for the value of the bark removed by it from the land aforesaid under the decree of the 19th of June, 1890, or for damages done to the said lands, and also how the costs of this suit shall be apportioned. Of the time and place of taking said accounts the said commissioner shall give notice by order of publication, which shall be equivalent to personal service to all parties in interest, except that personal notice shall be given to said company or its attorneys.

A copy.

Teste: D. H. LEE MARTZ, *Clerk*.

(Record, page 154.)

Decree Octo. Term, 1892.

This cause — on to be further heard this 1st day of November, 1892, upon the papers formerly read and proceedings formerly had and *argumented* of counsel; upon consideration whereof the court doth order, adjudge, order and decree that the decree heretofore entered in this cause is not intended to and it is hereby so modified as not to take jurisdiction to make partition of that portion of the 93,000 acres in the bill and proceedings mentioned which lies within the limits of the State of West Virginia.

A copy.

Teste: D. H. LEE MARTZ, *Clerk*.

* * * * * * *

(Record, page 157.)

And at another day, to wit, at a supreme court of appeals continued and held at the State court-house, in the city of Richmond, on Friday, December 21st, 1894.

CHARLES LENNIG and JOHN B. LENNIG, Executors of Charles Lennig, Deceased, App'lts,
against
JOHN K. WHITE, CLEMENT B. BARCLAY, and Others, App-lees.

Upon an appeal from a decree pronounced by the circuit court of the county of Rockingham on the 31st of October, 1892.

This day came again the parties by their counsel, and the court, having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the decree

appealed from of the 31st of October, 1892, is in every essential particular thereof clearly erroneous.

It is therefore decreed and ordered that the same be reversed and annulled, and that the appellee John K. White pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here; and this court proceeding to enter such decree as the said circuit court ought to have entered, it is further decreed and ordered that the injunction theretofore awarded in said cause be dissolved as to each and all the parties affected thereby, and that the bill of the complainant, John K. White, be, and the same is hereby, dismissed, and that the said John K. White pay to the defendants in said circuit court their costs by them in their defence in said circuit court expended.

Which is ordered to be certified to the said circuit court of the county of Rockingham.

(Record, page 159.)

The following is a copy of the opinion of the court referred to in foregoing decree:

Opinion of the Court, Richardson, J.

RICHARDSON, *J.*:

This is an appeal from a decree of the circuit court of Rockingham county, rendered on the 31st of October, 1892, in the suit in equity therein then pending wherein John K. White was plaintiff and Clement B. Barclay and others were defendants. The object of the suit was to have partition, under the provisions of section 2562 of the Virginia Code of 1887, of a tract of 93,000 acres of land lying in the counties of Rockingham and Pendleton, the latter county now being in the State of West Virginia, but formerly in Virginia, which tract of land was granted by the Commonwealth of Virginia in the year 1796 to John Barclay, a citizen of the city of Philadelphia and State of Pennsylvania. The substantial facts appearing by the record are these: On the 5th day of March, 1796, there was granted by the Commonwealth of Virginia to John Barclay, in his own right for one moiety and as assignee of Matthew Gambill for the other moiety, a tract of 93,000 acres of land lying partly in the county of Rockingham, in the State of Virginia, and partly in the county of Pendleton, now in the State of West Virginia, but formerly also in the State of Virginia. The tract of land thus granted to John Barclay in 1796 was in the year 1806 sold by Joseph Scott, marshal for the district of Virginia, in the name and as the property of John Barclay, as delinquent for the non-payment of the United States direct land tax due thereon; and at said sale H. J. Gambill became the purchaser of said tract of land, and by deed dated the 1st day of June, 1806, said marshal conveyed the said tract of land to said Gambill, the deed reciting the authority under which said sale and conveyance was made, and said deed was recorded in December, 1806. Thereafter the said tract of land was conveyed by the successive deeds now to be referred to: By

deed from H. J. Gambill and wife to Asher Waterman, dated December 16, 1806, and recorded December 16, 1806; by deed from Asher Waterman's heirs to Augustus Waterman, dated June 8, 1827, and recorded June 8, 1827; by deed from Augustus Waterman's devisees to the appellants' testator, Charles Lennig, dated July 9, 1859, and recorded July 9, 1859. All these conveyances are set forth in the plaintiff's bill, with the simple comment that all of them "are deeds of special warranty only"—a circumstance of no significance whatever touching the real merits of this controversy. The bill sets out at great length the genealogical history of the Barclay family and alleges that by deed bearing date the 8th day of May, 1890, from De Grasse Fox and Harriet Biddle, his wife, who is a remote descendant of said grantee, John Barclay, which deed has been duly recorded in the clerk's office of the county court of Rockingham county, the complainant is the owner of an undivided one-ninth interest in said tract of land and is desirous of having a partition of same in kind if such partition can be had with due regard to the interest of all concerned and if this be not practicable of having a sale of said land or at least that portion of the same that lies in the *sat* State of Virginia and a distribution of the proceeds; and the bill further alleges "that your complainant finds, however, that by an agreement dated the 6th day of March, 1890, one Charles Lennig (the appellants' testator) has undertaken to sell and convey to the J. P. Houck Tanning Company, a corporation under the laws of the State of Virginia, upon certain terms and conditions, all the tan-bark to be found in and upon said tract of land; and the said company has, through its agents and employés, entered upon the same and is now actively engaged in cutting down the chestnut trees and other growing timber upon the said tract of land from which said tan-bark can be procured, and unless restrained by the court will utterly destroy said timber, to the irreparable damage of the freehold;" and a copy of said paper is filed, marked "B," as an exhibit with the bill. The bill further sets forth that from said agreement it appears that the contract in respect to the sale of the right to cut and carry away said tan-bark was originally with J. P. Houck and J. C. Steigle, who assigned their interest in the same to England & Bryan, who in turn assigned the same to the said J. P. Houck Tanning Company; and the bill further sets forth that the said Lennig in said agreement professes to have acquired said tract of land from the heirs of Augustus Waterman, deceased, and, tracing this claim of title, your complainant finds it is derived through Augustus Waterman and the heirs of Asher Waterman, deceased, by deed with covenants of special warranty only from Henry J. Gambill, who bought the whole of said tract of land for the sum of $8.09 from Joseph Scott, marshal, as aforesaid, under a sale made of the same as the property of John Berkley (not Barclay), as delinquent, for the non-payment of the United States direct land tax and received a deed therefor, and thus practically admitting a good title in Gambill and those claiming under him; but the plaintiff in his bill proceeds to negative this seeming admission as fol-

lows: "That, as your complainant is informed and believes, these tax sales and deeds have been held to be illegal and invalid so often and so uniformly by the court as scarcely to constitute them sufficiently strong to make even a color of title to any lands referred to in them; that, as he avers in this case, the sale and deed aforesaid were had and made without the formalities required by law as the property of John Berkeley (not Barclay) under a law itself unconstitutional and void, the same and all deeds made in pursuance of and under said sale and deed must be set aside, canceled, and annulled." In this way, and only in this way, does the plaintiff in his bill attempt to assail the title of the appellants' testator. Then, after reciting the several deeds of conveyance hereinbefore referred to, the bill proceeds: "That in addition to the claims asserted to said tract of land under said deeds and under the agreement aforesaid with the 'J. P. Houck Tanning Company' your complainant finds that the corporation known as the 'Royal Land Company of Virginia' has placed upon record a deed of trust or mortgage, bearing date the 2d day of October, 1876, and recorded on the 20th of January, 1877, under which it professes to convey said tract of land as the owner thereof to the Fidelity Trust, Insurance and Safe Deposit Company of Philadelphia, also a corporation, in trust to secure certain bonded debts of said Royal Land Co. He also finds an agreement of record between Charles Lennig and the Potomac and Ohio Railroad Company, a corporation, dated April 20, 1881, and recorded on the 1st day of September, 1882; also an agreement between Charles Lennig and R. N. Pool, dated June 27, 1883, and recorded on the 3rd day of March, 1885, under which certain interests in the title of said Lennig are conveyed to said Pool; also a contract between R. N. Pool and James Boyce, dated February 27, 1885, and recorded on the 30th of March, 1885, under which the said R. N. Pool conveyed to the said James Boyce the undivided moiety of his rights under his contract with the said Charles Lennig, and also a further contract between the said R. N. Pool and Samuel E. Griscom, dated the 1st day of September, 1888, and recorded on the 6th day of January, 1890, under which the said Pool conveyed to said Griscom all interest then owned by him in the Lennig tract, among others; that your complainant also finds that Asher Waterman and Augustus Waterman while they were alive made some quitclaim deeds to small portions of said tract, but by whom these are now owned your complainant is unable to state, and he proposes to bring these claimants before the court by amended bill, if the same be deemed necessary or advisable. Wherefore, being remediless save in equity, where matters of this sort are alone and properly cognizable, your complainant prays that Clement B. Barclay, James Barclay, C. Francis Barclay, Mortimer Barclay, Christian Wallace, Edward Tranchard, Dudley Digg (Smith), and Mary, his wife, formerly Mary Barclay; Clement Philips and Ann C., his wife, formerly Ann Clifford Biddle; De Grasse Fox and Harriet B., his wife, formerly Harriet Biddle; Dr. Samuel Miller and Elizabeth, his wife, formerly Elizabeth Rebecca Biddle; William O. Biddle and Dr. Clement Biddle, Geo. W. Biddle, Mary L. C. Bid-

dle, widow of Chapman Biddle, dec'd; Charles Lennig, J. P. Houck, Jno. C. Steigle, Thos. Y. England, Edward A. Bryan, and Charles S. Walton, partners in trade under the firm name and style of England & Bryan: the J. P. Houck Tanning Co., a corporation; the Royal Land Co. of Virginia, a corporation; the Fidelity Trust, Insurance and Safe Deposit Co., a corporation; the Potomac & Ohio Railroad Co., a corporation; R. N. Pool, James Boyce, and Samuel E. Griscom, may be made parties defendant and be required to answer, answer under oath being expressly waived; that the J. P. Houck Tanning Co., its agents and employés and all other persons, may be enjoined and restrained from cutting any trees of any sort growing in and upon said tract of land for the purpose of peeling the bark therefrom, or for any other purpose, and from removing any timber of any sort already cut or any bark already peeled, until further order of the court; that the court may take cognizance of the various questions presented in this bill affecting the legal title to said tract of land, and that after these are determined there may be a partition of the same, if practicable, and if not practicable that there may be a sale of same and a distribution of the proceeds of sale for general relief," etc.

The injunction was granted according to the prayer of the bill. The J. P. Houck Tanning Company demurred to and answered the bill. In its answer, to which only a very brief reference is necessary, this respondent says that it contracted with Charles Lennig as set forth in the copy of the agreement filed with complainant's bill and with the full belief that the said Lennig was the legal and rightful owner of the said land and had the right to contract with respondent as he did; that respondent company was conducting an extensive tanning business at Harrisonburg, and had recently arranged, at very heavy cost, to greatly extend and enlarge its said business; that to effect this object it had entered into said contract with said Lennig as the surest means of conveniently procuring a sufficient supply of tan-bark, and had contracted to pay a more liberal price than he would have been willing to give for bark in smaller quantities; that it had expended a very large sum of money in enlarging its tannery and in securing the bark on this land, and that it could not obtain the necessary supply of bark elsewhere, as the season was too far advanced for peeling bark in sufficient quantities; and this respondent avers that the said Charles Lennig has been in the actual possession of this land under at least color of title, and, as it is informed and believes, under a good title for many years, certainly for as much as 30 years; that during all of this time the said Lennig has in every way exercised ownership and control over the land, and has had continuous, unbroken, open, and notorious possession of the land and adversary possession as to all claimants whomsoever and the world at large. "Your respondent further says that, believing that the said Charles Lennig has a complete and perfect title to the said land, and that he was fully authorized to treat and deal with respondent, it entered into the contract above referred to and proceeded to cut and peel bark, according to the terms and provisions of said contract; that it has al-

ready expended a large amount in cutting, peeling, and curing this bark, and has made contracts for the delivery of the same at its tannery at Harrisonburg, Va.; that it has already expended as much as $6,000, and respondent says that it does a very large business at Harrisonburg, Va., in tanning six hundred hides per week, and has made arrangements so that the output of its tannery will be 1,200 hides per week; and respondent further says that it relied upon said contract, as being made between parties competent to contract, and relied upon the bark which had been cut from this large tract of land to supply its tannery, and its operations are dependent upon it; and respondent therefore prays for a dissolution of the injunction, so far as it is concerned, or, if the court will not dissolve the injunction, then that a bond be required of sufficient penalty to indemnify and save respondent harmless from loss resulting from said injunction," etc. Later, in vacation, the said J. P. Houck Tanning Company moved to dissolve the injunction, which motion was overruled, but the restraining order was so far modified as to permit, under certain specified conditions, the said company to remove from said land the bark already cut and peeled. The defendants J. P. Houck and J. C. Steigle and Thomas Y. England and Edward A. Bryan and Charles S. Walton, partners doing business under the firm name and style of England & Bryan, jointly demurred to and answered the bill; but the matter contained in their answer need not be further referred to, as the same is not necessary to a proper decision of this case.

At the April term, 1891, the death of the defendant Charles Lennig was suggested, and the cause was revived against his executors, the appellants Nicholas Lennig and John B. Lennig, and at the October term, 1891, by leave of court, the executors filed their demurrer to the plaintiff's bill and assigning several specific grounds of demurrer, to which the plaintiff replied generally, and the same was argued by counsel, upon consideration whereof the court overruled the demurrer, and thereupon, on the motion of said executors, leave was given them to file their answer, and the same was then filed, with general replication thereto. In their answer they admit that on the 5th day of March, 1796, there was granted by the Commonwealth of Virginia to John Barclay, of the city of Philadelphia, a tract of 93,000 acres of land, situated as set forth in the complainant's bill; they suppose it is true that said Barclay died many years ago, but they say they are not informed whether the persons named in the bill are the heirs of John Barclay, and in this respect they neither admit nor deny, but they do deny that either the said John Barclay or any of his heirs are entitled to any right, title, or interest in the bill mentioned; but, on the contrary, they say that they are the owners of a large portion of the said tract; that it is true that Charles Lennig, respondents' testator, did make the contract with Houck and Steigle by which he sold to them the right to cut and remove bark, etc., and they believe Complainant's Exhibit B is a correct copy of that agreement; that they further say that their testator had a perfect right and full power to make said contract and agreement; that he bought

said land from W. H. Ruffner and others, devisees of Augustus Waterman, in 1859, and on the third day of July of the same year received a deed therefor, which on that day was duly recorded in the office of the clerk of the county court of Rockingham county; and they file a copy of the said deed with and as a part of their said answer, and also a copy of the will of Augustus Waterman they likewise file; that the said Augustus Waterman derived title to said land through the will of Asher Waterman, his father, and a deed from the heirs of Asher Waterman; they file with and as a part of their answer copies of said will and deed; that the said Asher Waterman derived his title thereunto through H. J. Gambill by deed of date December 16, 1806, which they also exhibit with and as a part of their answer, and that said Gambill, by deed from J. Scott, marshal of the district of Virginia, of date January 6, 1806, a copy of which deed is also exhibited by them, said land being sold in pursuance of law by said marshal as delinquent for the non-payment of the United States direct tax assessed thereon by the United States Government; and these respondents say that all of the provisions and requirements of the act of Congress of the United States under which the land was sold were fully complied with; and, further answering, they say that their testator and those through whom he claimed have been in undisputed actual possession and ownership of said land for nearly a century under and by virtue of said conveyances, etc.; that no one has ever questioned the validity of their title until this suit was brought, and there is no just ground for it now; that for nearly a century they have *been* had open, notorious possession, adverse to the complainant and the rest of the world; that they have paid all the taxes assessed against the land since 1806; have sold many smaller tracts from the original tract and put the purchasers in possession; that deeds of conveyance were duly executed and recorded, and that the purchasers have since their purchases been in undisputed, open, and notorious and continuous adversary possession under and by virtue of said conveyances for a great many years—for more than the statutory period; that they have from time to time had tenants on the land to watch over it, care for it, and prevent depredations; have leased portions of the land and received rents therefor, and, in fact, in every way exercised such open, notorious acts of ownership and continued adversary possession as the land from its character and quantity was susceptible of. Respondents deny that John Barclay or those claiming under him have ever had actual possession of any part of this land now sought to be taken from the estate of their testator; and the respondents further say that in addition to the delinquency and non-payment of the United States direct tax for which the land was sold by said Scott, marshal of the district of Virginia, the said John Barclay also forfeited his title thereto by his failure to pay the taxes assessed thereon and due to the Commonwealth of Virginia, as they will show from the auditors' books of this State, and that the said Barclay nor any one for him has ever redeemed the said land after it was so forfeited, so that the chain of title under which the plaintiff claims from the Common-

wealth is broken and forfeited, and he has no title whatever; and respondents further say that the land has not been assessed to the said John Barclay or his heirs on the assessors' books of Rockingham county since the year 1806; that the complainant and those under whom he claims have not at any time had the land placed upon the land books of either Rockingham or Pendleton counties, and assessed for taxes and paid the taxes thereon, as required by law to be done by persons claiming to own land which has been dropped from the land books, etc. The cause came on to be heard at the October term, 1892, when a decree was pronounced declaring that the complainant and others claiming under the original patent to John Barclay and under the title which has descended to some of them as his heirs-at-law and under the devises and conveyances made — others from some others of said heirs-at-law are the rightful owners of the tract of 93,000 acres of land in the bill and proceedings mentioned and described; that they be quieted in their possession and ownership of the same; that the deeds and contracts set forth and referred to in said bill of complaint, to wit, the deed from Joseph Scott, marshal, to Henry J. Gambill, dated the 1st day of June, 1806, and recorded December —, 1806; the deed from H. J. Gambill and wife to Asher Waterman, dated December 16, 1806, and recorded on the same day; the deed from Asher Waterman's heirs to Augustus Waterman, dated 28th of June, 1827, and recorded on the same day; the deed from Augustus Waterman's devisees to Charles Lennig, dated the 9th day of July, 1859, and recorded on the same day; the agreement between Charles Lennig, the J. P. Houck Tanning Company, Houck & Steigle, and England & Bryan, dated the 6th day of March, 1890, and recorded on the 22nd day of March, 1890; the agreement between Charles Lennig and Richard N. Pool, dated 27th day of June, 1883, and recorded on the 3d day of March, 1885; the deed of trust or mortgage from the Royal Land Company of Virginia to the Fidelity Trust, Insurance & Safe Deposit Company of Philadelphia, dated the 2nd day of October, 1876, and recorded on the 2nd day of January, 1877, and the agreement between Charles Lennig and the Potomac & Ohio Railroad Company, dated the 20th day of April, 1881, and recorded on the 1st day of September, 1882; the agreement between Richard N. Pool and James Boyce, dated the 27th day of February, 1885, and recorded on the 3rd day of March, 1885, and the agreement between Richard N. Pool and Samuel C. Griscom, dated 1st day of September, 1888, and recorded on the 6th day of January, 1890, be cancelled, vacated, and annulled in so far as they relate to or have any connection whatever with the title to said tract of 93,000 acres of land, and declaring and decreeing certain other things necessary to be here more particularly referred to. From that decree the case is here appealed.

Instead of passing seriatim upon the question directly and incidentally presented by the record we will present our view of the whole case, in order that the correctness of the conclusion arrived at may be more readily apprehended. The 93,000 acres of land in controversy was granted by the Commonwealth of Virginia to John Barclay by patent dated the 5th day of March, 1796, and the same

was regularly entered on the land books of the State and the taxes assessed thereon in his name from the year 1797 to the year 1806, inclusive, not one cent of which has ever been paid by said Barclay or his heirs or by any other person for him or them. Not only was this land so delinquent and forfeited to the State of Virginia, but it was also delinquent for the non-payment of the United States direct tax charged thereon in pursuance of certain acts of Congress which need not be here enumerated, it being admitted in the plaintiff's bill that the land was so delinquent, and was in 1806 sold by Jos. Scott, United States marshal for the district of Virginia, for the non-payment of such taxes, and that the same was at such sale purchased by H. J. Gambill, who received from said marshal a deed therefor, dated and recorded as above stated. John Barclay, the original grantee, a citizen of the city of Philadelphia, died in the year 1815 intestate, leaving numerous descendants, as is shown by the history of the family set out in the plaintiff's bill; and although he lived for nine years after the sale of this land by the United States marshal, it is not pretended that he ever in any way evinced the least disposition to question the validity of either the sale or conveyance made by that officer of the law, nor did he during his life or his heirs since his death ever take any steps either to challenge the validity of the sale and conveyance by said marshal or to redeem the land from the forfeiture to the State. By virtue of the tax sale made by the United States marshal in 1806 to H. J. Gambill of the tract of land in controversy, his conveyance thereof to said purchaser, the successive conveyances thereof down to that to the testator of the appellants, and the open, notorious, and habitual acts of ownership by the said successive alienees under, to say the least, colorable title for nearly a century, and the palpable acquiescence therein by John Barclay during his life and by his heirs since his death, has ripened the title so acquired and transmitted into a perfect title that cannot in any way be affected by the claim asserted by the appellee or by those under whom he claims. The title thus acquired has passed unscathed through three generations of people, and its validity has never been questioned except on three occasions now to be referred to. Nearly 70 years prior to the institution of the present suit one Abraham Joseph asserted a claim under a junior grant to a part of this land. Asher Waterman, the then occupant, brought his action of ejectment in the superior court of Rockingham county against said Joseph, and in said action recovered the land in controversy. Later Asher Waterman brought an action of trespass against the same Abraham Joseph in respect to this same 93,000 acres of land, and in that action Waterman prevailed. Still later and during the ownership and occupancy of this tract of land by Augustus Waterman one Blaine asserted claim to part thereof, and by agreement between Augustus Waterman and said Blaine, the parties to said controversy, the whole matter was submitted to the arbitrament and award of that able and painstaking lawyer, Green B. Samuels, who was afterwards and honored and honorable member of this court, and in the year 1843 he rendered his award in favor of Waterman, as

the owner of the land by title paramount. The result of these controversies, which arose many years ago and when the circumstances attending the sale of this land by the United States marshal were doubtless fresh in the memory of many living men, powerfully vindicate the validity of the tax title here in question and under which the testator of the appellants and those under whom he claims have occupied, used, and enjoyed the land for now nearly 90 years. Such has been the open, notorious, and habitual acts of ownership in respect to this tract of land that it long since acquired a local designation. Persons who have lived on and near the land from infancy to old age testify that they never heard of the Barclays, and that they have always known the land as the "Waterman survey." So well known is the land by the name of the "Waterman survey" that a description of it by metes and bounds in a deed conveying the same would be unnecessary. In Hutchinson on Land Titles (section 395) it is said: "But a description by metes and bounds is not necessary when the premises are well known by name," etc., citing a number of authorities, and among them Snapp *v.* Spengler, 2 Leigh, 1, and Beverly *v.* Fogg, 1 Call, 484.

Moreover, under the title in question, numerous smaller tracts, parts of the Waterman survey, have been sold and conveyed, and the purchasers thereof have received conveyances which were promptly recorded, have been put in possession, and have built on, cultivated, and improved their premises, respectively, and have occupied, used, and enjoyed the same for many years without challenge or molestation from any source. John Josephs, a witness for the appellee, testifies that he has known the south end of the tract since he was 12 years old; that it was always called the "Waterman land;" that his father, who had died four years previous, was then 84 years old, and that he had frequently heard him say "Gus Waterman"—meaning Augustus Waterman—leased parts of the land to persons to get out shingles and lumber, and gave personal supervision and attention to the protection of the land against all depredations; that the land recovered by Waterman from Blaine was sold to his father by Waterman, and Waterman said that the judgment which he had obtained against Blaine for trespass belonged to his father, and he gave this judgment to Waterman for the privilege of working the timber to the head of the hollows; that Waterman also had a man named David Ray working timber on the land under contract. Melvessa Hulvey, another witness for the appellee, shows occupancy for a great number of years, under sales by Waterman, at the north end of the survey, and never heard of any Barclays, and never heard of any one except the Watermans and those claiming under them exercising ownership over the land. Sol. Gladwell, another of the appellee's witnesses, shows the public notoriety of Waterman's habitual exercise of acts of ownership and enjoyment, and also the employment of witness by Lennig as his agent. Dr. Ruffner shows that Augustus Waterman's chief income for many years was from the lease and sale of smaller tracts within this large one, and that he let timber rights, cattle ranging, etc.; that he received shingles and cooper stuff in payment for rent; that he had tenants and agents living on the

land in different sections, and that many of the timbermen made contracts in advance with Mr. Waterman or his agents, and that he heard the names of tenants and agents, but cannot recall them. In addition to these open and notorious evidences of occupation, use, and enjoyment, there is the regular succession of conveyances, to wit, that from the United States marshal to Gambill, the purchaser at the tax sale; that from Gambill to Asher Waterman; the will of Asher Waterman devising this land to his heirs, of whom Augustus Waterman was one, and the conveyance by the heirs of Asher Waterman other than Augustus to the latter, and the conveyance by the heirs of Augustus Waterman to Charles Lennig, the appellants' testator; and there are these further evidences of open and notorious claim of ownership: First, the power of attorney executed by Augustus Waterman to Timothy Green in 1811, Augustus Waterman's deed to James Hopkins in 1842 for 900 acres of this tract of land, the deed of Augustus Waterman to Jacob Bowman in 1843 for 210 acres of same, the sale to Josephs in 1843, the deed from Augustus Waterman to James A. and William Harriss in 1847 for 200 acres, the deed from same to Arch. Hopkins in 1847 for 161 acres, the verbal contract of sale between Augustus Waterman and George Shoemaker in 1848 for 100 acres, under which contract Shoemaker paid part of the purchase-money, was put in possession, and built, improved, and cultivated the same and has continuously occupied, used, and enjoyed the same ever since, but in subordination to the Waterman title, he never having paid the balance of the purchase-money, and therefore has never received any deed; the deed from Augustus Waterman to James Hetzel in 1850 for two tracts; also the deed from same to D. R. and Arch. Hopkins (two tracts), 150 acres. Moreover, it was stated in argument and not denied that numerous other sales and conveyances were made by Augustus Waterman which have not been copied into the record. Add to all these the several contracts and agreements between Charles Lennig and others since said Lennig became owner of this land, all of which, together with the several conveyances heretofore referred to, and constituting the unbroken chain of title under which Lennig, the appellants' testator, claimed, and all of which, except the conveyances of parts of this tract by Augustus Waterman as above set forth, are recited in the complainant's bill; and can it be said that these numerous evidences of continuous occupation, use, and enjoyment for near 90 years—these continuous, open, notorious, and habitual acts of ownership under a continuous claim of ownership—are not in every respect fully equivalent to an adversary possession evidenced by actual continuous residence, cultivation, and improvement? In the light of well-settled principles we think not.

In Taylor *v.* Burnsides, 1 Grat., 165, Judge Baldwin, at page 192, clearly defines a-versary possession and the essential elements thereof. He says: "An adversary possession must also be actual in reference to the means by which it is acquired. In that sense I understand an actual possession to be the occupation, use, or enjoyment of the subject-matter of controversy by residence, cultivation, improvement, or other open, notorious, and habitual acts of owner-

ship. Of occupation, use, or enjoyment, residence, cultivation, and improvement, respectively, while they continue, are usually the most obvious and decisive; but there may be other open, notorious, and habitual acts of ownership of quite equivalent import and effect. Take, for example, the case of a town resident who, claiming title to a lot or tract of woodland in the vicinity, openly, notoriously, and habitually cuts and hauls from it his necessary supplies of fuel or in like manner makes it a source of revenue by sales of fire-wood or lumber, or the case of an uninclosed or unimproved lot in or near a city devoted by the professed owner to his use or profit as a coal or lumber yard, quarry, or landing place. There cannot be stronger instances of actual possession than these and other like cases which might be stated, but they can serve only for the purpose of illustration. When we have the unquestionable tests of residence, cultivation, and improvement, every case must depend in a great measure upon its own circumstances, and requires a recurrence to the general principle above stated of open, notorious, and habitual acts of ownership. That principle must, moreover, be guarded in its application by taking care not to confound an adverse claim with an actual possession, and by distinguishing between repeated tresspasses under a pretense or even belief of title and the dominion, control, and enjoyment of actual or apparent ownership. That an adversary possession requires actual occupancy or what is equivalent to it is sustained by an overwhelming current of American decisions. * * * There is no case, I think, which, when closely examined, will be found in opposition to this doctrine unless it be that of Ewing *v.* Burnet, 11 Pet., 41, and if impugned in that case it is by some of the reasoning and not by the opinion of the court." Judge Baldwin then proceeds to state the case of Ewing *v.* Burnet, as follows: "It was an action of ejectment in which the verdict and judgment were for the defendant. The property in controversy was a lot in the town of Cincinnati, incapable, from the character of its surface, of being inclosed, unfit for cultivation, and without any building or other improvement upon it. Its only value was for the sand and gravel, and the taking and removing thereof the only use to which it was applied. The evidence tended to prove the open, notorious, and habitual use of it by the defendant in that way for upward of twenty years, and that his use of it by himself and his lessees was exclusive, except occasional trespasses by others, which he prohibited, and for which he sought redress by actions of trespass." The opinion in Ewing *v.* Burnet, *supra*, was delivered by Mr. Justice Baldwin, of the United States Supreme Court, while that in Taylor *v.* Burnsides, *supra*, was delivered by Judge Baldwin, of this court, and as it becomes necessary to compare these two opinions for the purpose of showing that, as respects the essential elements of adversary possession, there is no practical difference between them, we will, for convenience, refer to them as Mr. Justice Baldwin and Judge Baldwin. Now, after the remarks above quoted, Judge Baldwin, after some comments on the opinion of Mr. Justice Baldwin in Ewing *v.* Burnet, not pertinent to the present inquiry, proceeds to quote from the opinion of Mr. Jus-

tice Baldwin and to criticise his remarks as follows: "Is is well settled that to constitute adverse possession there need not be a fence, building, or other improvement made. It suffices for this purpose that visible and notorious acts of ownership are exercised over the premises in controversy for twenty-one years after an entry under claim and color of title. So much depends on the nature and situation of the property, the uses to which it can be applied or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule adapted to all cases; but it may with safety be said that where acts of ownership have been done upon land which, from their very nature, indicate a notorious claim of property in it, and are continued for twenty-one years, with the knowledge of an adverse claimant, without interruption or an adverse claim by him for twenty-one years, * * * and an actual adverse possession against him, if the jury shall think that the property was not susceptible of a more strict or definite possession than had been so taken and held. Neither actual occupation, cultivation, or residence are necessary to constitute actual possession when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership such as he would exercise over property which he claimed in his own right and would not exercise over property which he did not claim." The criticism of Judge Baldwin is as follows: "Now, what the court thus said in relation to acts of ownership sufficient to prove an ouster and continued adverse possession may be very true in reference to the case before it, was the result of a combination of the circumstances of that case and required the actual knowledge of them by the other party; but, with great deference, it seems to me it is not a safe guide, if so intended, as furnishing rules to ascertain what is an adverse possession, for the language employed, if taken abstractly, would serve to indicate an adverse claim rather than an adverse possession. That acts of ownership on the property indicate an adverse claim is not, as I humbly conceive, sufficient, unless they amount to an adverse possession—that is, to the occupation, use, or enjoyment of the premises; nor is it sufficient that they show a continued claim of the party such as he would exercise over property which he claimed in his own right and would not exercise over property which he did not claim. Such language strikes me as remarkably loose and indefinite and as calculated to occasion darkness instead of light, which, I think, must be the result of any attempt to give it a practical application as a test of adverse possession."

Counsel for the appellee, seizing upon this criticism by Judge Baldwin, and evidently misled thereby, comes to the conclusion that the doctrine of adversary possession is incorrectly laid down by Mr. Justice Baldwin in Ewing *v.* Burnet, and has been repudiated by the courts of this and other States. This is obviously a mistake. The doctrine laid down by Mr. Justice Baldwin in Ewing *v.* Burnet is that held by the Supreme Court both before and since that decision, and subsequent thereto has been reaffirmed by Mr.

Justice Clifford in Harris *v.* McGovern, 99 U. S., 161, decided in 1878; by Justice Field in Fletcher *v.* Fuller, 120 U. S., 534; 7 Sup. Ct., 667, decided in 1887; and by Chief Justice Fuller in Coal Co. *v.* Doran, 142 U. S., 417; 12 Sup. Ct., 239. In the case last mentioned the very language which counsel for the appellee has characterized as an "unguarded expression" is by the learned chief justice quoted verbatim. As respects the doctrine of adverse possession and the elements essential to constitute it, there is practically no difference between the statement of the rule by Mr. Justice Baldwin in Ewing *v.* Burnet and that by Judge Baldwin in Taylor *v.* Burnsides. The two cases are often quoted side by side without any adverse criticism of the former. It is perhaps true that Judge Baldwin's statement of the rule is more clear and compact than that of Mr. Justice Baldwin, and that the illustrations given by the former are happier than those given by the latter; but their statements, when taken together, import one and the same thing. Judge Baldwin says: "I understand an actual possession to be the occupation, use, or enjoyment of the subject-matter of controversy, by residence, cultivation, improvement, or other open, notorious, and habitual acts of ownership. Of these modes of occupation, use, or enjoyment, residence, cultivation, and improvement, respectively, while they continue, are not always, but usually, the most obvious and decisive; but there may be other open, notorious, and habitual acts of ownership of quite equivalent import and effect." And Mr. Justice Baldwin, with less amplitude of statement and omitting the words "residence, cultivation, and improvement, the usual, most obvious, and decisive tests of occupation, use, or enjoyment," and speaking with reference to the case in hand, covered all the ground necessary in that case by saying: "It is well settled that to constitute an adverse possession there need not be a fence, building, or other improvement made. It suffices for this purpose that visible and notorious acts of ownership are exercised over the premises in controversy for twenty-one years (the statutory period) after an entry under claim and color of title," etc.; and all of the language criticized by Judge Baldwin is predicated of the language by Mr. Justice Baldwin last above quoted, and is referable to the case the learned judge had under consideration in which, as in the present case, actual residence, cultivation, and improvement by the owner or claimant were out of the way, and in which, as here, the question was whether the occupation, use, and enjoyment by "visible and notorious acts of ownership" came up to the requirement expressed by Judge Baldwin in the words "or other open, notorious, and habitual acts of ownership," so as to constitute an adversary possession for the statutory period. We fail, therefore, to perceive the justness of Judge Baldwin's criticism of the language and reasoning of Mr. Justice Baldwin; we fail to perceive in the reasoning any tendency to confound an adverse claim with an actual possession, or any failure to distinguish between repeated trespasses under either a pretense of belief of title and the dominion, control, and enjoyment of actual or apparent ownership. Again, Judge Baldwin says: "When

we leave the unquestionable tests of residence, cultivation, and improvement every case must depend, in a great measure, upon its own circumstances and requires a recurrence to the general principle above stated of open, notorious, and habitual acts of ownership." Precisely the same principle is stated by Mr. Justice Baldwin, as follows: "But it may with safety be said that where acts of ownership have been done upon land, which from their nature indicate a notorious claim of property in it, and are continued for twenty-one years with the knowledge of an adverse claimant without interruption or an adverse claim by him for twenty-one years, such acts are evidence of an ouster of a former owner and an actual adverse possession against him," etc. Now, this must, in the nature of things, be so, for while it is true that of the different modes of use, occupation, or enjoyment those of residence, cultivation, and improvement are the most obvious and decisive, yet there are other acts of open, notorious, and habitual ownership—or, as Mr. Justice Baldwin expresses it, "visible and notorious" acts of ownership—exercised over the premises in controversy for the period necessary to constitute the statutory bar after an entry under claim and color of title. Obviously the two forms of expression convey one and the same idea, for "visible and notorious" acts for the statutory period are the full equivalent of open, notorious, and habitual acts for the same period, and whether the one or the other, if the acts proved are sufficiently strong to clearly indicate that the claimant entered, used, and enjoyed the premises with the intention of holding against all the world, then such acts constitute an actual adverse possession. It is clear that there is no substantial difference in the statements of the judges as respects the underlying principles of actual adverse possession; but if a real and substantial difference did exist, then the doctrine laid down by Judge Baldwin in Taylor *v.* Burnsides, *supra*, is quite sufficient for a just decision of this case.

It should be borne in mind that prior to the emanation of the title under which the testator of the appellants claimed the title of John Barclay, the original grantee, had become delinquent and was forfeited and was extinct, by reason whereof the land was sold and conveyed by the United States marshal; that it was not only delinquent and forfeited by reason of the non-payment of the United States direct tax lawfully charged thereon, but was delinquent and forfeited by reason of the non-payment of the taxes lawfully assessed thereon by the State from the year 1797, to the year 1806, inclusive, not one cent of which was ever paid; that since 1806 this land has never been on the land books in the name of John Barclay or of any one claiming under him; that from 1806 down to the present time the land has been regularly on the land books in the names of the testator of the appellants and those under whom he claimed, and they have regularly paid all the taxes assessed thereon; that not only have no taxes on said land ever been paid by John Barclay or his heirs or by any other person for him or them, but neither said Barclay nor his heirs have ever taken any steps to redeem or reclaim said land or asserted any claim or right to do so until the institution of this suit, although a period of time has

elapsed a great many years in excess of the period necessary to constitute the statutory bar. The constitutionality of ever forfeiting land as delinquent for non-payment of taxes has been repeatedly held by this court. See remarks of Lee, J., in Wild's Lessee *v.* Serpell, 10 Grat., 408, and cases cited. In order to consummate and perfect a forfeiture in such a case no judgment or decree or other matter of record is necessary. The statutes *proprio vigore* asserted effectually to divest the title out of the defaulting owner, and perfectly to vest it in the Commonwealth, so that John Barclay's title having become extinct by reason of forfeiture, and there never having been any redemption, there remained in him no vestige of title to pass to his heirs in any way. As to the effect of such forfeiture see Hutch. Land Titles, § 78, and authorities cited. Hence, at the time of the emanation of the tax title under which the appellant's testator claimed, the title of John Barclay, the original grantee, having become forfeited and extinct, the possession was vacant, and there was no person living who could assert any right to the possession adverse to that acquired by the appellant's testator and those under whom he claimed; and the deeds to them respectively constituting color of title, even though defective in both form and substance, and their deeds importing the right of entry and occupation, they entered, used, and enjoyed the premises and exercised continuously thereover such open, notorious, and habitual acts of ownership as constitute an actual adverse possession against all the world.

These acts of ownership were so open, notorious, and habitual, continuing, as they did, for over 80 years next before the bringing of this suit, as to constitute notice at least to all persons who might have any claim whatever to the land in controversy; but the circumstances disclosed by the record clearly indicate that the appellee, J. K. White, purchased the one-ninth interest which he claims to own with actual knowledge of the title under which the testator of the appellants claimed. He purchased his claim in the city of Philadelphia, where most of the numerous descendants of John Barclay lived. The interest obtained by him was that of Mrs. Harriet Biddle Fox, the wife of De Grass Fox and a remote descendant of John Barclay. The other heirs either disclaimed any right, title, or interest in the land in question or for other reasons declined to embark in this novel enterprise of the appellee, Mr. J. K. White. The Barclays and Biddles are noted families in the city of Philadelphia, and extensively connected by marriage. Judge George W. Biddle, one of the Barclay heirs and a witness for the appellee, being asked if he knew whether his grandfather, John Barclay, had any interest in any Virginia lands in his lifetime, answered: "I have heard that he had, but I had no reason to believe it except from being pestered very often to make deeds, which I have never done." On cross-examination he was asked: Q. "I understand you to say that you had heard some rumors to the effect that Mr. John Barclay had some lands in Virginia, but that you had no reason to believe that he had any title to them except that you had been pestered very frequently to sign deeds, which you have refused to do." A. "That statement is

correct." Q. "Will you be kind enough to state when was the last time you were applied to on this subject and state the circumstances?" A. "I am under the impression it was in the present year, 1890; it may have been 1889; I think 1890. I was asked if I would sign some deed conveying my supposed right, title, and interest in said land to some one. After talking the matter over with my cousin, Clement B. Barclay, we both concluded we would have nothing to do with it." Q. "Well, then, I understand that you do not claim any title at all to this land?" A. "I never have made, nor now make, any claim to any such supposed lands." Judge Biddle also says he is under the impression that he had heard that such supposed lands, or parts of them, have been sold under proceedings which, in the State of Pennsylvania, are termed "tax sales." Doubtless the Barclay heirs frequently conferred with Judge Biddle, a prominent member of the family and a lawyer of note, and availed themselves of his superior information and professional knowledge and skill. In fact it is plain from the deposition of Mr. Arthur Biddle, a son of Judge Biddle and a great-grandson of John Barclay, that such was the fact. Arthur Biddle was also a witness for the appellee. He testified that these lands were frequently the subject of conversation in his family and with the family connections, descendants of John Barclay, and that it was a subject of notoriety in the family, being sometimes discussed in the way of gossip, and at other times as a matter of business. Now, the appellee, J. K. White, must have made quite a close canvass of the Barclay heirs, and, although he got but one recruit, that circumstance of itself indicates strongly that the others, constituting quite a number of persons, like Judge George W. Biddle and Mr. Clement B. Barclay, disclaimed any interest and refused to have any connection with the transaction. Again, the deed from Fox and wife to the appellee, White, was procured on the 8th day of May, 1890; on the 23d day of the same month the bill had been prepared, reciting the numerous deeds constituting the chain of title under which the testator of the appellants claimed, setting forth the contracts of record in the bill mentioned, tracing the tax titles and claim thereunder from the sale and conveyance by the United States marshal down to Charles Lennig and averring his claim thereunder, and on the 24th day of the same month the bill was filed and process issued thereon. Thus, after a repose as still as death and acquiescence for over 80 years, all at once the appellee, J. K. White, succeeds in arousing one of the slumbering heirs of John Barclay, and this monstrous claim is asserted by a bill in equity, which on its face shows the utter poverty of the claim—a poverty which is equaled only by the audacity of the claim.

In view of all the circumstances disclosed by the record, the conclusion is irresistible that the appellee became the so-called purchaser of the claim asserted by him purely as a matter of bold adventure and speculation, and that he made the so-called purchase with full knowledge of the adverse claim of the testator of the appellants, which had stood unchallenged and uninterrupted for over 80 years. Notice may be actual or constructive, and whether the

one or the other the result is the same. It is the settled doctrine that whatever circumstances are sufficient to put a purchaser upon an enquiry, which, if pursued, would lead to the requisite knowledge and information, are sufficient to charge him with actual knowledge of the facts to which such circumstances would lead him; or, in other words, he must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon its face, or to the knowledge of which anything appearing there will conduct him, or, in the yet more appropriate and expressive language of Mr. Justice Strong in De Cordova *v.* Hood, 17 Wall., 1, where that learned judge said: "Whenever inquiry is a duty the party bound to make it is affected with knowledge of all which he would have discovered had he performed the duty. Means of knowledge, with the duty of using them, are in equity equivalent to knowledge itself." See also Long *v.* Waller, 29 Grat., 347; Wood *v.* Krebbs, 30 Grat., 708; Coles *v.* Withers, 33 Grat., 186; Lamar's Ex'r *v.* Hale, 79 Va., 147; Hurn *v.* Keller, *id.*, 415; Effinger *v.* Hall, 81 Va., 94; Wood *v.* Carpenter, 101 U. S., 135. In Effinger *v.* Hall, *supra*, Lewis, P., says: "A strong case on constructive notice is Armentrout's Ex'rs *v.* Gibbons, 30 Grat., 632. There a deed reserving a vendor's lien was duly recorded and afterward the record of the deed was destroyed. It was held that the constructive notice afforded by the recordation of the deed was equivalent to actual notice of the existence of the lien, notwithstanding the destruction of the records." So, in the present case, the avenues of informations have for over 80 years been open and accessible. For all this period the public records of Rockingham county, where most of the land in controversy is situated, have teemed with evidences of the claim asserted by the testator of the plaintiff and those under whom he claimed, and during all which time they have exclusively occupied, used, and enjoyed the premises without interruption, as evidenced by their continued, open, notorious, and habitual acts of ownership, quite equivalent in import and effect to occupation, use, and enjoyment, evidenced by residence, cultivation, and improvement. Had John Barclay during his lifetime, or those claiming under him since his death, come forward and asserted their rights in due time and form, they might have reclaimed this land which had been sold as delinquent for the non-payment of the United States direct taxes, lawfully charged thereon, but this manifest duty they failed to perform and sat supinely down and neglected to pay the lawfully assessed taxes, neglected to take any steps to redeem the land, and now come admitting the sale of the land as delinquent, admitting the sale and conveyance by Scott, the marshal, to Gambill, and tracing by a regular succession of conveyances the title down to Charles Lennig, the testator of the appellants, and only assail the title thus derived by alleging in their bill in a general way, without specifying any particulars, that the United States marshal did not comply with the law in making said sale, and that, therefore, the said sale and conveyance, as well as all other conveyances and devices constituting links in said chain of title, are invalid and void.

It is in proof that the most diligent and laborious search has

been made in the different departments of Government, Federal and State, and in every other direction where there could be the least hope of discovering any evidence of the regularity of the tax sale, but after the lapse of so many years it has been impossible to discover all the evidence necessary to show affirmatively that said sale was made in every particular in conformity to the requirements of law. Moreover, it is in proof that the private papers of the two Watermans were many years ago destroyed by fire. The law required the marshal, in such cases, to return and file in the district court at Richmond the report of sale, who was the purchaser, and the amount for which the land was sold, with other evidences of the regularity of the sale. In all probability the papers necessary for the purpose would have been found in the clerk's office or among the papers of that court, but, unfortunately as the proof shows, a large quantity of the papers of that court and office were consumed in the great conflagration which added so much terror to the closing scenes of that great civil strife which devastated and impoverished this Commonwealth throughout her borders. Was it possible to do more than was done to protect the title in question? We think not. In respect to said tax sale and in view of the peculiar circumstances of hardship attending this case and the great lapse of time and seeming acquiescence on the part of John Barclay and those claiming under him and the apparent abandonment of all claim on their part, it will be presumed that all was done that the law required to be done, and that said sale was regular and valid. In Black, on Tax Titles, 2d ed., § 461, it is said: "Mere lapse of time will not of itself afford presumptive evidence of the regularity of a sale if the purchaser and those claiming under him have not had possession under the deed—that is, the antiquity of a tax deed, if no possession has been taken under it, affords no presumption in its favor, but, on the contrary, operates the more strongly against the holder. But where the tax purchaser has been in possession the case is different. Here the responsibility for failure to institute proceedings to test the validity of the title rests alone upon the original owner. It would be unfair to raise a presumption against the purchaser in consequence of his omission to do that which he was under no obligation to do, except, indeed, as a means of making doubly sure a claim in which he may reasonably be supposed to have had confidence. And, on the other hand, it seems perfectly just to cast an implication on the owner, to the effect that his failure to make any attempt to rescue his land during a considerable number of years from the consequences of the tax sale could only be attributable to his knowledge of the fact that such an attempt would result in demonstrating the validity of the tax title. We have, therefore, no difficulty in assenting to the statement that an ancient tax deed and its recitals, together with long-continued and uninterrupted possession, are evidence from which compliance with the statute in regard to tax sales may be presumed, and the question thereon is one for the jury upon all the evidence in the case."

It would be useless to adduce arguments and quote authorities

to show the peculiar appropriateness of the principle above stated to the case in hand. We do not assert the proposition that in the present case the marshal's deed is *prima facie* evidence of title; and while it may not be such, yet we do assert that it constitutes color of title under which the testator of the appellants and those under whom he claimed entered upon and enjoyed the premises, not by actual residence, cultivation, and improvement, but by "other open, notorious, and habitual acts of ownership," exercised continuously for the full period of the statutory bar, and has thereby ripened into a complete and perfect title. In 2 Blackw., Tax Titles, § 1112, commenting on certain cases, the author says: "In both these cases there was a long and uninterrupted possession under the tax title, and the party in whose favor the presumption was extended was not the original purchaser at the tax sale, but an innocent person, who, for aught that appears, had no notice in fact of the irregularities in the proceeding; and the court place the presumption upon the ground that the jury must be 'satisfied that the deficiencies in the evidence are not chargeable to the fault or negligence of the party,' and that no better evidence within the power of the party 'is willfully withheld.' This doctrine cannot therefore be extended to the original purchaser, 'for he is bound to collect and preserve the evidence' upon which the validity of his title depends; and if he has failed to do so, it is his own folly. Again, it will be observed that the rule as laid down in the case cited requires good faith and a diligent and thorough effort on the part of the person claiming the benefit of the presumption in collecting all the evidence which can be produced tending to throw light upon the regularity of the original proceedings of the officers. Strict search must be made in all the offices and places and inquiry made of all persons for the documents and facts necessary to establish the validity of the title. The presumption is not raised for the purpose of supplying any defect in the doings of the officers, but to fill up the gap occasioned by a supposed loss of testimony, which, if it had been preserved, would have established, to the satisfaction of the court, the existence of the very prerequisite in question." The present case comes squarely within the principle above stated. Here the party whose title is assailed upon the supposed ground of irregularity in the tax sale was not the original purchaser at that sale and is to that extent entitled to the benefit of the rule; nor can it be said that any deficiency in the evidence is attributable to his fault, nor that any better evidence within his power is willfully withheld, nor that most anxious, diligent, and thorough search has not been made in order to discover the papers which would certainly vindicate the validity of the tax title. Again, it is said: "A tax deed founded upon an actual sale and purporting by apt words to convey the title to the real estate therein described to the grantee will give color of title, notwithstanding it may be defective in form or substance or be founded on proceedings so irregular or defective as not to pass the true title. We do not at present speak of a deed void on its face, but all the authorities we have cited will sustain the

rule above given if the tax deed is at least apparently fair. Thus, a tax deed gives color of title, although the judgment on which it is founded be fatally defective; and possession of land in good faith may well be under a sufficient color of title, though it be under a tax sale not preceded by any advertisement thereof." Black., Tax Titles, § 503, citing Pillow *v.* Roberts, 13 How., 472; Flanagan *v.* Grimmet, 10 Grat., 421. So, where land was sold by a commissioner under the delinquent land laws, it was said: "He acts like a commissioner to make sales under a decree of the chancery court and is clothed with a mere naked authority. Having no interest in the land conveyed, the deed of the commissioner would avail nothing where his authority to make it did not appear, unless there had been such a long acquiescence and possession under the deed as to justify a presumption in favor of the deed." Walton *v.* Hale, 9 Grat., 197, 198. Perhaps no case more than this ever demanded every reasonable presumption in favor of a tax sale and title thereunder. It is, indeed, a very remarkable case, one in which the record discloses not a single circumstance favorable to the decree of the court below. It is, in fact, nothing other than an action of ejectment in equity. The argument has proceeded almost entirely upon the law applicable to an adversary possession, and upon this ground alone the court below might well have sustained the demurrer upon the familiar principle that where a party has an adequate and complete remedy at law a court of equity will not entertain him; but as to the demurrer and the several specific grounds assigned therefor we decide nothing, inasmuch as this proceeding is under section 2562, Code 1887, and it is insisted that the jurisdiction of a court of equity in proceedings for partition under said section is not restricted to tenants in common, joint tenants, and coparceners, as the language so plainly indicates, but that persons claiming adversely to all those seeking partition may be convened in the same suit, and that such court may take cognizance of all questions of law arising between them, and inasmuch as several comparatively recent decisions of this court are relied upon by counsel for the appellees to sustain his contention, and inasmuch as a discussion of the questions arising on the demurrer would be untimely after having considered and passed upon the merits of the case, and would necessarily involve a lengthy review of the cases referred to, which could serve no good purpose now, suffice it to say that while the writer is firmly convinced that a court of equity has no jurisdiction in this and like cases, and that the authorities relied upon do not sustain the position contended for by counsel for the appellee, yet, for the reasons stated and others that need not be mentioned, we decide nothing touching the proper construction of said section 2562.

In conclusion, it only remains to say that in the light of all the facts disclosed by the record it is undeniably true that the conduct of John Barclay and his heirs from the time of the tax sale to the bringing of this suit has been such as is consistent only with an absolute abandonment, with complete notice of all the circumstances, of all claim to the land in controversy; that the appellee makes no

case by his bill entitling him to have partition of the land as prayed for in his bill or to any relief in a court of equity, and that it would be a great and unconscionable wrong to now permit him to wrest this land from the rightful owners when they have lawfully occupied and used and enjoyed it without interruption and without challenge for nearly a century, during which time three generations of people have gone to their graves. For the reasons given above the decree appealed from should be reversed and annulled, the injunction dissolved, and such decree entered here as the court below should have entered. Decree reversed.

Lacy and Fauntleroy, JJ., absent.

* * * * * * *

(Record, page 173.)

And now at this day, to wit:

At a supreme court of appeals held at the State court-house in the city of Richmond Thursday, April 4, 1895, being the day and year first herein mentioned—

Came again the parties by their counsel, and the court, having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said decree is erroneous. It is therefore decreed and ordered that the same be reversed and annulled and that the appellee, John K. White, pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here.

And this court proceeding to pronounce such decree as the said circuit court ought to have pronounced, it is further decreed and ordered that the injunction awarded in the cause be dissolved as to each and all the parties affected thereby, and that the bill of the plaintiff be dismissed, and that the plaintiff, John K. White, pay to the defendants their costs by them about their defence in said circuit court expended, which is ordered to be certified to the said circuit court of the county of Rockingham.

(Record, page 175.)

The following is a copy of the opinion of the court referred to in the foregoing decree:

Opinion of the Court.

LENNIG'S EXECUTION
v.
WHITE and Others. } Opinion by Judge James Keith.

RICHMOND, VA., *April*, 1895.

At the November term, 1894, of this court a decree was entered in this cause and a petition for rehearing was filed, which petition being presented to the Hon. Drury A. Hinton, he, on the 26th day of December, 1894, endorsed thereon that in his opinion a rehearing

should be granted, he being one of the judges who had heard and decided the case and had united in rendering the decree. Upon this certificate a rehearing was awarded by the court at its January term, and the cause was restored to the privileged docket and was again argued during the present term.

We are of opinion that the decision of this court at its November term reversing the decree of the circuit court of Rockingham was correct, and we therefore direct that it be now entered as a final decree of this court.

While we accept the conclusions of the court as expressed at its November term aforesaid in the opinion of Judge Richardson, which will be found in vol. 20, p. 831, S. E. Rep., we do not wish to be understood as concurring in all the views which he presents upon the several matters of law and fact discussed by him.

A true transcript of the record.

Teste: GEO. K. TAYLOR, *C. C.*

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Additional Extracts from Transcript of Record.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 708.

JOHN K. WHITE, PLAINTIFF IN ERROR,

vs.

NICHOLAS LENNIG AND JOHN B. LENNIG, EXECUTORS OF CHARLES LENNIG, DECEASED.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

RECORD FILED AUGUST 20, 1893.

(15,998.)

(15,998.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 15, 1896.

In the Supreme Court of the United States.

CHARLES LENNIG'S EX'ORS, Appellants,
vs.
JOHN K. WHITE and Others, Appellees.

Upon an appeal from a decree of the supreme court of Virginia reversing a decree pronounced by the circuit court of Rockingham county, in said State, in favor of John K. White, appellant here, and dismissing his bill of complaint, with costs.

To the honorable the judges of the Supreme Court of the United States:

The assignment of errors of John K. White respectfully showeth—

That the facts disclosed by the record are as follows, to wit:

John Barclay, a prominent citizen of Philadelphia, one time its mayor, by letters patent dated March the 5th, 1796, issued by Robert Brooke, governor of the Commonwealth of Virginia, became seised and possessed in fee of a tract of land containing 93,000 acres, lying in the county of Rockingham, in the Commonwealth of Virginia, and partly in the county of Pendleton, now in the State of West Virginia. He died in 1816 and his heirs are given in the record. Harriet Biddle, one of the said heirs, the wife of De Grasse Fox, by deed dated May the 8th, 1890, in which her husband joined, conveyed to John K. White, of Hyndman, Bedford county, Pennsylvania, "all their right, title, and interest in and to all that portion of a certain tract of land which lies in the county of Rockingham, in the State of Virginia, which said tract of 93,000 acres was granted to John Barclay by Robert Brooke, governor of Virginia, by patent dated the 5th day of March, 1796, to which patent reference is made for a more particular description of said tract of land," the said Harriet Biddle Fox being one of the heirs of John Barclay and also one of the residuary devisees of James Barclay, a son of the said John Barclay.

The appellant White brought his suit in chancery in the circuit court of Rockingham county for a partition of that part of the land which lies in the State of Virginia and for an injunction to stay waste, which he averred was being committed upon it. This suit was instituted under the authority of a statute law of the State, which provided that "tenants in common, joint tenants and coparceners, shall be compellable to make partition, and the circuit court of the county or the circuit, or corporation court, of the corporation, wherein the estate or any part of it is, shall have jurisdiction in cases of partition, and in the exercise of such jurisdiction, as a court of equity, may take cognizance of all questions of law affecting the legal title that may arise in any proceeding." See Code of Virginia, edition of 1887, section 2562.

The same statute, word for word, has always been in force in the State of West Virginia.

The proper construction of this statute, though it was the sub-

ject of considerable controversy in the courts below, has now been definitely settled by the recent decision of the United States circuit court of appeals for the fourth circuit, embracing the States of Virginia and West Virginia in the case of Uhlman *vs.* Iager, not yet reported. The decision is to the effect that under the true construction of the statute just quoted a court of equity can take jurisdiction of questions of law affecting the title of adverse claimants; that the whole matter of title and of the rights of the parties in the premises may be determined and a partition ordered whenever the plaintiff shows himself seized of the requisite title, whether the land is held or claimed adversely or not.

In other words, the proceeding in a suit for partition under the statute in Virginia is as to adverse claimants nothing more nor less than an action of ejectment.

See 17 American and Eng. Ency. of Law, p. 711.
" 2nd Minor's Institutes, p. 479.
" Currin *vs.* Spraull, 10th Grattan, p. 147.
" Davies *vs.* Tibbs, 82nd Va. Rep., p. 603.
" Bradley *vs.* Zehmer, 82nd Va. Rep., p. 688.
" Fry *et als. vs.* Payne *et als.*, 82nd Va. Rep., p. 761.
" Hudson *vs.* Putney, 14th West Va. Rep., p. 561.
And, finally, the case cited above of Uhlman *vs.* Iager, not yet reported.

Acting upon this view of the statute, which is now decided to be the correct view, the appellant White set forth in his bill the history of a tax title under which the J. P. Houck Tanning Company just two months previous to the institution of said suit had entered upon the land and was then actively engaged in cutting down the chestnut trees and other timber growing upon the same from which tan bark could be peeled, and averred that unless restrained by the court it would do irreparable injury to the freehold. He set forth that these lands, which were the property of John Barclay, had been sold by one Joseph Scott, marshal of the district of Virginia, as delinquent for the non-payment of the United States direct land tax assessed against the same in the name and as the property of "John Berkley," and had been conveyed by deed dated January the 1st, 1806, to Henry J. Gamble, who paid for the entire tract of 93,000 acres the paltry sum of eight & $\frac{9}{100}$ dollars ($8.09); that Gamble, by deed dated December the 16th, 1806, for the consideration of five hundred dollars, had sold said land and made a deed therefor to Asher Waterman; that upon Waterman's death this alleged title to this tract of land had passed to his heirs-at-law, who, for a consideration of one thousand dollars, had conveyed the same to Augustus Waterman by deed dated June the 8th, 1827, and the said Augustus Waterman's heirs had conveyed to Charles Lennig by deed dated the — day of ——, 1859.

That Charles Lennig had in time sold the right to cut and carry away the tan bark on said tract to Houck & Steigel, on the 13th day of December, 1889, and they had sold their privilege to the J. P. Houck Tanning Company by agreement of date the 6th day

of March, 1890, just previous to the institution of the suit by the appellant.

The bill prayed:

1st. For an answer from the defendants, waiving answer under oath.

2nd. For an injunction against the J. P. Houck Tanning Company to restrain waste.

3rd. For the court to take cognizance of the various questions presented in this bill affecting the legal title to said tract of land, including the tax title aforesaid, which the bill averred to be illegal and invalid; and—

4th. For a partition of the land in kind, if that were practicable, and, if not, that there might be a sale and the distribution of the proceeds of sale.

The bill was demurred to by the J. P. Houck Tanning Company and certain other defendants, under whom said company claimed title, and these parties filed their answers to the bill. The bill was also demurred to by Charles Lennig's executors, and, the demurrers being overruled, these executors filed their answer, and, a general replication having been filed to said answer, issue was taken thereon.

The defenses set up in the answer of Lennig's executors were:

First. That the tax title under which they deraigned title was a valid and perfect one; that the land had been sold pursuant to law by Joseph Scott, United States marshal, for the non-payment of taxes assessed against John Barclay by the Federal Government, known as the United States direct land tax; that all of the provisions and requirements of the act of Congress under which the land was sold had been fully complied with, and that they were the owners of a large portion of said tract under conveyances made under said tax title.

Second. That they had been in undisputed actual possession and ownership of said land for nearly a century under and by virtue of said conveyances; that they had exercised such open and notorious acts of ownership and continued adversary possession over it as the land, from its character and quality, was capable of, and that Barclay and those claiming under him had not had any actual possession of any part thereof.

Third. That the title of John Barclay in and to said tract of land had been forfeited to the Commonwealth of Virginia by his failure to pay the taxes lawfully assessed thereon by and to said Commonwealth; that neither the said John Barclay nor any one for him had ever redeemed the said land, and that their testator, Charles Lennig, and those under whom he claimed, after the forfeiture of the Barclay title and the expiration of the time in which he was allowed to redeem, had located said land and had ever since paid the taxes due to the Commonwealth of Virginia, and that they have so paid said taxes as owners of the land; that the chain of title from and under which the appellant claims had been broken and forfeited, and that he had no title whatever.

After depositions had been taken and other evidence adduced,

the cause was heard upon the pleadings and this evidence and re
sulted in the decree of the 31st of October, 1892, which annulled the
tax title under which the tanning company was cutting and de
stroying the timber and perpetuated the injunction against them.
At the same time the cause was referred to a master commissioner of
the court with instructions to enquire and report how much and what
portion of said lands had been lost to the owners thereof by adverse
possession, claimed and held by parties other than those before the
court, so as to see what still remained to which a good title could
be made in the event of a sale for purposes of partition.

From this decree an appeal was taken by Charles Lennig's execu-
tors to the supreme court of appeals of Virginia, and that court
rendered a decree by which, for reasons "stated in writings and
filed with the record," the decree of the circuit court was reversed,
and the appellate court, proceeding to render such decree as it
said the court below should have done, dissolved the injunction
and dismissed the bill with costs.

Subsequently, upon the application of the appellant White and
upon the certificate of one of the judges who decided the case ad-
versely to him "that there was good cause for a rehearing," the
same was granted, and upon this rehearing the court declared that
"we are of the opinion that the decision of this court at its Novem-
ber term, reversing the decree of the circuit court of Rockingham,
was correct, and we therefore direct that it be now entered as a final
decree of this court."

"While we accept the conclusions of the court as expressed at its
November term aforesaid in the opinion of Judge Richardson,
which will be found in vol. 20, p. 831, S. E. Rep., we do not wish to
be understood as concurring in all the views which he presents
upon the several matters of law and fact discussed by him."

Accordingly a decree was again entered dismissing the bill of the
appel-ant White with costs.

This appellant is advised and insists that this decision and de-
cree of the supreme court of appeals of Virginia is erroneous; that
in making said decision and decree the said court determined certain
Federal questions, to which a writ of error lies to the Supreme
Court of the United States; that these questions of Federal law
were of such a controlling character that their correct decision was
necessary to the decree of the court of appeals aforesaid, and that
there is manifest error, as shown by the record and proceedings
in said cause, in this, to wit:

The said supreme court of appeals of Virginia, in it- decision and
decree aforesaid, applied "to the title of John Barclay to these lands
the forfeiture laws of the State of Virginia," and declared that this
title "had become delinquent for non-payment of taxes and was
forfeited and was extinct;" "that these forfeiture laws were consti-
tutional," and that "no vestige of title remained in John Barclay or
his heirs."

The reasoning of the court is thus given in its opinion:

"It should be borne in mind that prior to the emanation of the
title under which the testator of the appellants claimed the title of

John Barclay, the original grantee, had become delinquent and was forfeited and was extinct, by reason whereof the land was sold and conveyed by the United States marshall; that it was not only delinquent and forfeited by reason of the non-payment of the United States direct tax lawfuliy charged thereon, but was delinquent and forfeited by reason of the non-payment of the taxes lawfully assessed thereon by the State from the year 1797 to the year 1806, inclusive, not one cent of which was ever paid; that since 1806 this land has never been on the land books in the name of John Barclay or of any one claiming under him; that from 1806 down to the present time the land has been regularly on the land books in the name of the testator of the appellants and those under whom he claimed, and they have regularly paid all the taxes assessed thereon; that not only no taxes on said land have ever been paid by John Barclay or his heirs or by any other person for him or them, but neither the said Barclay or his heirs have ever taken any steps to redeem or reclaim said land or asserted any claim or right to do so until the institution of this suit, although a period of time has elapsed a great many years in excess of the period necessary to constitute the statutory bar. The constitutionality of ever forfeiting land as delinquent for the non-payment of taxes has been repeatedly held by this court. See remarks of Lee, J., in Wild's Lessee *vs.* Serpell, 10th Gratt., p. 408, and cases cited. In order to consummate and perfect a forfeiture in such a case no judgment or decree or any other matter of record is necessary. The statutes profess *proprio vigore* effectually to divest the title out of the defaulting owner and perfectly to vest it in the Commonwealth, so that John Barclay's title having become extinct by reason of forfeiture, and there never having been any redemption, there remained in him no vestige of title to pass to his heirs in any way." "As to the effect of such a forfeiture, see Hutch'n Land Titles, p. 78," and authorities cited. "Hence, at the date of the emanation of the tax title under which the appellant's testator claimed, the title of John Barclay, the original grantee, having become forfeited and extinct, the possession was vacant and there was no person living who could assert any right to the possession adverse to that acquired by the appellant's testator and those under whom he claimed, and the deed to them respectively constituting color of title, even though defective in both form and substance, and their deed impo-ting the right of entry and occupation, they entered, used, and enjoyed the premises and exercised continuously thereover such open, notorious, and habitual acts of ownership as constituted an actual adverse possession against all the world."

It is manifest from this language that the alleged forfeiture of the Barclay title was the controlling influence and consideration that determined the court's decision against the appellant, White.

The court first finds "that the Barclay title was forfeited and extinct;" then as a corall-y therefrom that the constructive seisin and possession which Barclay's legal title gave him was destroyed; that no one was seized of the lands, and that "the possession was absolutely vacant," and then as further deduction from these premises

it found that no disseisin was necessary, but that the tax deed, worthless as it is conceded and held to be, gave the right of entry and occupation; that "no person living could assert any right of possession adverse" to that thus "acquired under the tax deed;" that Lennig and those under whom he claimed had entered and exercised certain open, notorious, and habitual acts of ownership sufficient to constitute an actual adverse possession against all the world, and that these were sufficient—meaning, of course, under the circumstances just set forth—to constitute adverse possession.

It is submitted that the court could not have held, and that it did not hold, that these acts of ownership were such as to suffice ordinarily to have wrought an actual disseisin of the true owners of the land and to constitute adverse possession.

Disseisen is defined to be "the unlawful entry upon the freehold of another and the wrongful ouster of him from possession."

There is a distinction to be observed between disseisin *a* and dispossession; the latter may relate merely to occupancy without reference to the title and may be either right or wrong; disseisin is an attack upon and a wrong to the freehold and open, exclusive, adverse entry and expulsion of the true owner." (Kent's Commentaries, vol. IV, p't 6, lecture lxvii, p. 482; see 1st vol. International Dictionary, word disseisin.)

First. The possession of Charles Lennig and those under whom he claimed was not actual. It consisted only in the cutting of timber and the getting of shingles, hoop poles, etc., from the property, without residence upon the land or any cultivation or improvement thereof, without any change in its condition, accomplished or in progress, and without any taking of the esplees, although the land is, for a very large part, arable land.

It was not sufficient in the light of the decision of your honor's court in the recent case of Ward *vs.* Cochran, 150 U. S. Rep., p. 597, and of the Virginia authorities, Taylor *vs.* Burnsides, 1st Gratt., 190; Core *vs.* Faupel, 24th W. Virginia, p. 246.

Second. It was not open and exclusive. The lumbering and shingle business was not confined to Lennig and those under whom he claimed. It is proven that most of it was done by trespass. Moreover, it was not confined to one particular locality; it was at one place today and at another tomorrow, a roving possession, which cannot bar the right of entry of the true owners, even though continued for the whole statutory period. See Sedgwick & Waite on Land Titles, 1st ed., section 739; see also Ward *vs.* Cochran, 150 U. S. Rep., p. 597.

"It is only where the possession has been actual, open, and exclusive for the period prescribed by the statute of limitations to bar an action for the recovery of lands that the presumption of the deed can be invoked." See Fletcher *vs.* Fuller, 120 U. S. Rep., p. 545.

Third. There was no color of title to support the claim of adverse possession.

There was no deed or other title paper which defined the land or described it by metes and bounds, or otherwise, as a fence around it would do. See Bradstreet *vs.* Huntington, 5 Peter, p. 39; Wright

vs. Mathison, 18 Howard, U. S. R., 50; Hutchinson on Land Titles, p. 218.

Moreover, the tax deed in this case itself could not give color of title, since it is void on its face.

1st. It professes on its face to carry out the sale of the lands as the property of John Berkly. Is it not void as to the land of John Barclay, in whose name the land then stood on the assessment books and land records of Virginia, especially as it does not — a compliance with section 5 of the act of March 16th, 1802, in which case alone is a good title given under the act.

2nd. It shows on its face that there was no advertisement of the land as required — the 11th section of the act of Congress of 1798, as construed in your honor's court in Parker *vs.* Rule, 9th Cranch, p. 64.

In this case the court said:

"It appears to the court that the 13th section presupposes everything enjoined in the 9th and 11th sections to have been performed, and that the validity of the sale of land owned by a non-resident, made by the collector for the non-payment of taxes, must depend not only on his having made the publications required in the 13th section, but on his having made those also which are required in the 11th section.

Those publications not having been made in this case, it is the opinion of the majority of this court that the sale is void, and that the judge of the district court committed no error in giving this instruction to the jury."

Being void on its face, it is not even admissible in evidence in support of claim of adverse possession under the statute of limitations. "It is of no avail." The law will not assist it. No statute of limitations can then be brought in to aid its validity. See Redfiel *vs.* Parks, 132 U. S. Rep., 251 & '2.

So that it is clear that it is only because of the supposed forfeiture of the Barclay title and the want of actual or constructive possession in him that the acts of ownership relied upon could be regarded as effectual.

The decision of the court upon the Federal question—the constitutionality of these forfeiture laws—was adverse to the appellant White and, it is submitted, was erroneous.

It is true that in the decision of the court on the rehearing the forfeiture laws were not referred to, and it may be claimed that they cut no figure in the decision and were not applied to the lands in controversy, and that the court did not rest its decision upon them.

It is submitted with absolute confidence, however, that without the application of some such supposed forfeiture to these lands the court could never have made the decision it did make; that without holding that "the Barclay title had become extinct, and that no vestige of it remained," it could not have held that those claiming under the tax title had actually disseised the true owners of the land, and that the parties claiming under a void and illegal tax title had disseised or expelled the true owners and had had that

actual, exclusive, and continuous adversary possession for the statutory period which is necessary under the law to ripen such tax title, conceded to be defective and worthless, into a good one, or, to state it in other words, the finding by the court that the land had become forfeited in the name of Barclay, and that "the Barclay title was extinct and every vestige of it gone," was the indispensable and controlling consideration in both the decisions of the court, and that consequently, unless the view entertained by the court upon the question of the supposed forfeiture of the title of Barclay to the land be correct, the decision cannot be sustained for a moment.

While it is true that the court in its decision upon the rehearing rendered on the 4th day of April, 1895, did not say in their opinion whether they applied the forfeiture laws referred to to these lands or not, it is plainly manifest that without the assumption or finding of such forfeiture their decision is indefensible, and should not be approved.

If they did not apply the forfeiture laws to which reference has been made, the court must have applied to these lands a forfeiture law of its own enacting, and was more egregiously in error, if that can be said of error at all, in that case than in the former.

The statutes of the State of Virginia which declare these forfeiture- make no provision whatever for any inquest or other legal proceeding after due notice in order to divest the title of the owner. They profess to operate *proprio vigore*. They simply forfeit the land for a failure on the part of the owner to have himself charged on the proper books for taxation for a certain number of years, and they vest the title immediately in the State.

This enactment by the legislative department of the State of Virginia, it is earnestly submitted, was an arbitrary exercise of the powers of government which "Magna Charta" intended to prevent when it declared "that no person should be deprived of life, liberty, or property except by the judgment of his peers or the law of the land."

They are in direct contravention of the provisions of the fourteenth amendment to the Constitution of the United States, which forbids any State from making or enforcing any law to deprive any person of life, liberty, or property without due process of law, which is but a re-enactment in the form of a constitutional protection of the principles of the great charter.

In the State of Virginia itself there are several learned discussions of the question thus presented.

In the celebrated case of Kinney *vs.* Beverly, reported in 1st Hen. & Mun., p. 316, the learned president of the court, Judge Tucker, delivered an opinion in which he used the following striking language:

"I have always considered that, from the period of our revolution, the Commonwealth succeeded to the political power of the King in all cases whatsoever, and that its rights, privileges, and remedies were to be in general ascertained by the standard of the common law, as it respected the political character of the King,

where the same were not controlled or enlarged by the express terms of the constitution or the clear and definite provisions of some statute of the Commonwealth."

"On this ground I have held that the Commonwealth (like the King in his political character) could neither take nor grant anything but by matter of record. (See Plowd., 213, 484; Finch, 82; 3rd Blackstone Com., 259.) The reason given by the latter is 'that it is part of the liberties of England and greatly for the safety of the subject that the King may not enter or seize any man's possessions upon bare surmises without the intervention of a jury.' The reason is equally applicable to our Government as to a monarchy, or, rather, in a government founded upon the principles of liberty the reason is stronger than in any other. There is one exception, however, to this rule in England, it being particularly enacted by the statute of 33 H. VIII, c. 20, that in the case of attainder for high treason the King shall have the forfeiture instantly without any inquest of office. The period when this statute was made was under a bloodthirsty tyrant whose parliaments were but abject registers of his arbitrary edicts. Nevertheless, in the construction of this very statute it hath been held that if one be attainted of high treason all his lands by virtue of that statute are presently in the King—that is, the estate in the land is in the King without office found; but it doth not appear to the court of exchequer of what lands the person attainted was seized at the time of his attainder or after, and therefore there goes a commission from the exchequer under the seal of that court to make such inquiry, and this is called an office of instruction, and this is a sufficient record to instruct the King of the certainty of the land by which it may be put in charge (5 Co., 52, Rage's case), and before that statute it was held that if a man was attainted of high treason by act of Parliament, and it was thereby enacted that he should forfeit all his lands, yet that was not sufficient to vest any freehold in deed or in law in the kin until an office found, for the words 'shall forfeit' were only sufficient to vest a right or title in the King (Plowd., 486, Nichols' case), and the same doctrine is recognized by the unanimous opinion of the court (3 Co., 10, Dowtie's case); and in both these cases the authority of Brooke, tit. Office, 17, was relied on to this effect: Where a man is attainted by Parliament, and thereby it is ordained 'that all his lands shall be forfeited, and it is not said they shall be in the King without office, there they shall not be in the seisen of the King to grant over without office, for it does not appear of record what lands they are.' So in the present case, although the taxes be not paid on certain lands, the property of A, in the county of B, for the space of three years, whereby the right to those lands is forfeited to the Commonwealth, yet until an office be found or some other legal proceeding had (if any such can be pointed out) to show the certainty of the land, the seisen thereof is not in the Commonwealth to grant over; without such seisen any grant thereof would be void by the common law, for the Commonwealth, having but a right and not a seisen, cannot make a grant of lands, as was adjudged in Dowtie's case, 3 Co., 10; and this construction of the act is con-

firmed, in my opinion, by the remark of Sir Edward Coke (2nd Institutes, 221) upon that clause of the statute of Westm. T., c. 31, which relates to tolls, by which it is declared that if excessive toll be taken in any city, &c., the King shall seize the franchise of the fair or market until it be redeemed by the owner, 'but,' says Lord Coke, 'this is intended upon an office found, for in statutes incidents are ever supplied by intendment.'

"A further reason in support of this opinion arise- from that principle of moral justice, recognized by the Magna Charta in England and by the statute of our own Commonwealth (which is a transcript from the former), whereby it is declared that no citizen shall be disseised of his freehold or be condemned but by lawful judgment of his peers or by the law of the land, the meaning and intention of which certainly is that no man shall be deprived of his property without being first heard in his own defence (2 Inst., 49, 50). In the case before us the plaintiff has been disseised of his lands, and they have been granted over to a third person without any notice or warning whatsoever."

The question is most ably discussed in Martin *vs.* Snowden, trustee, &c., 18 Gratt., p. 135, &c., Judge Joynes delivering the opinion of the court:

"Can a forfeiture of the land charged with taxes, such as is contended for in these cases, be regarded as 'due process of law' upon the principles established by that case? Literally speaking, it is not any process at all, but operates by force of law and without any process or proceeding whatever, except the ascertainment by the commissioners of the sum chargeable on the land; but that is probably immaterial."

"The forfeiture of land to the Crown does not appear to have been a means recognized and employed in England at any period of its history for enforcing the payment on taxes or other debts due to the Crown. If it had been, we should have found such forfeitures treated of in the English law books, but we nowhere find them mentioned."

"The summary methods employed in England in early times for the collection of debts to the Crown seem to have been turned to purposes of oppression, and one of the chapters of the Magna Charta was provided for their restraint. Before that time the King for his debt had execution of the body, lands, and goods of his debtor (2 Inst., 19), but by Magna Charta it was provided that the King should not seize any land or rents for any debt as long as the present goods or chattels suffice to pay the debt and the debtor himself is ready to satisfy therefor. In conformity with this provision a conditional writ was framed, commanding the sheriff to enquire of the goods and chattels of the debtor, and if they were not sufficient to extend the lands. Mr. Justice Curtis quotes Gilbert as saying that since the statute, 33 Henry 8, ch. 39, the practice has been to issue the writ in an absolute form against land and goods, without requiring any previous inquisition as to the goods (18 How., U. S. R., 277)."

"Mr. Justice Curtis, in the case just cited, refers to various stat-

utes of the colonies and of the States before the adoption of the Constitution for the collection of public dues, and in all of them, so far as quoted by him, the process is given against the goods as well as the lands of the debtor, and generally with the provision that the lands shall not be taken unless the goods prove to be insufficient. In not one of them is there a provision for the forfeiture of the land or for a proceeding in any form against the land alone."

"A statute of Virginia said to have been passed in 1785 has been cited to us as an instance in which a State, before the adoption of the Constitution, declared lands to be forfeited absolutely for the non-payment of taxes. This is the only instance of the sort that has been cited to us; but this statute was really not passed in 1785, but in 1790, when this sort of forfeiture was for the first time introduced in Virginia. 2 Revised Code of 1819, 517; Opinion of Judge Roane in Kinney *vs.* Beverly, 2 Hen. & Mun., 518."

In Black on Tax Titles, see p. 195, it is said: "It has been strongly doubted whether it is consistent with the constitutional rights of individuals for the State to take to itself the title to their private property in this manner in consequence of a personal default without a judicial ascertainment and assertion of the delinquency.

The power has been denied with more or less emphasis and clearness in several cases; but, on the other hand, it has been recognised and asserted as valid and constitutional in several courts of respectable authority. The grounds of constitutional objection to this method of proceeding will at once suggest themselves; indeed they rest principally on the unlawfulness of depriving a party of his property without "due process of law." The question is still open to serious doubt on the authorities, but we think Judge Cooley takes an impregnable position when he says: "If by forfeiture it is understood the vesting in the State a title which shall be absolute and beyond dispute, the question presented is different. It is impossible that there can be any right to declare such a forfeiture, except as the result of an adjudication to which the owner was a party, which has determined that the default upon which the forfeiture was based exists in fact, and that the requisite steps which were to precede the forfeiture have actually been taken. In some judicial tribunal the party whose freehold is seised has a right to a hearing on these questions: a constitutional right, if constitutional protections to property are of any avail."

Can the decree of the court below be sustained in the light of these principles?

Its decision cannot be sustained upon any such grounds as the want of jurisdiction in a court of equity in such suits for partition. The recent decision of Uhlman *vs.* Iager determines that question against any such pretension.

It cannot be sustained upon any possible pretence of adverse possession under color of title, since, as we have already seen, the possession of the adverse claimants was neither actual nor exclusive, nor under color of title.

It cannot be sustained upon any claim of adverse possession, since the deed from Joseph Scott, U. S. marshal, is void on its face

as to the lands of John Barclay, since it recites an advertisement of the land of John Berkly, not John Barclay—the distinguishing patronymics of two conspicuous, but wholly different families—and void on its face from its failure to make any reference to or recital of compliance with the 11th section of the act of 1798 and of section 5 of the act of March, 1802. The deed is of no avail to support the bar of possession under the statutes of limitations.

See Redfield *vs.* Parks, 132 U. S. Rep., p. 281.
Coulter *vs.* Stafford, 15th U. S. Rep., Opp. 128.
Sheehy *vs.* Hinds, 27th Minnesota, 259.
Mason *vs.* Crowder, 85th Missouri, 526.
Cutler *vs.* Hurlbut, 29th Wisconsin, 152.
Gomer *vs.* Chaffer, 6th Col., 314.
Wofford *vs.* McKinna, 23rd Texas, 36.
Hind *vs.* Brisson, 3rd Washington, 1.

It is submitted that its correctness depends wholly and beyond reasonable doubt upon the right of the court itself, if the forfeiture statutes are not applicable, to declare that the title of Barclay and those claiming under him to these lands had become forfeited and was extinct without an inquest found, without any proceeding of record, without even a declaratory statute, and, as a corollary therefrom, that there was no seisin which could oppose the acts of ownership exercised by those who claimed under the tax title, and therefore their feeble and intermittent acts of ownership were sufficient to constitute adverse possession, under color of title, and to ripen it into a good title by the lapse of time.

Can there be any doubt that, without the reliance of the court upon this supposed forfeiture, the title of the Barclays had never been divested out of them, either by tax deed or by actual, exclusive, adverse possession, either with color of title or without it?

It is earnestly submitted that the court cannot work a forfeiture of the title without notice and without trial any more than the law-making power can do it.

The design of the constitution is "to exclude arbitrary power from every branch of the Government, and there would be no exclusion if such rescripts or decrees were to take effect in the form of a statute."

Even if a court after acquiring jurisdiction was to render judgments without trial, or if in rendering one kind of a judgment it rendered one which included that which it had the right to render and something more, the excess is void. See *Ex parte* Lange, 18 Wall., p. 178.

The supreme court of Virginia has itself held that "a court may rightfully obtain jurisdiction, and its decree may be void because in the progress of the cause it has exceeded its jurisdiction. In such cases the decrees may be attacked directly or collaterally." See Seamster *vs.* Blackstock, 83 Va. Rep., p. 232.

It is well settled in your honor's court that the constitutional provision as to "due process of law" was intended to apply to the

proceedings of the judicial department of the State governments, as well as to the legislative departments.

Cooley, Constitutional Limitations, p. 491, declares—

"That individual citizens require protection against judicial action as well as against legislative, and perhaps the question what constitutes due process of law arises as often where judicial action is in question as in any other cases."

Speaking of the question of forfeiture, on page 444, he says:

"Nor can a party by his misconduct so forfeit a right that it may be taken away from him without judicial proceedings in which the forfeiture shall be declared in due form." "Forfeitures of rights and property cannot be adjudged by legislative acts, and confiscation without a judicial hearing after due notice would be void, as not being due process of law."

Say the learned judges of the U. S. circuit court of appeals:

"It is a principle that lies at the foundation of all just governments that no man shall be deprived of his life, liberty, or property without due process of law. Every disregard of this principle by the courts, legislature, or citizens tends directly toward distrust, insecurity, disorder, and anarchy. It may be difficult, perhaps impracticable, to give a definition of due process of law which would comprehend all cases as they arise, and it is certainly unnecessary to do so. Chancellor Kent says: 'The better and larger definition of due process of law is that it means law in its regular course of administration through courts of justice' (2 Kent's Comm., p. 13). Certain it is that in judicial proceedings due process of law must be a course of legal proceedings according to those rules and forms which have been established for the protection of private rights. It must be one that is appropriate to the case and just to the parties affected; it must be pursued in the ordinary manner prescribed by law; it must give to the parties to be effected an opportunity to be heard respecting the justice of the judgment sought; it must be one which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial." See Burton *vs.* Platter, 10 U. S. Appeals, part 2, p. 657.

"A departure from the established mode of procedure will often render a judgment void." (See Windsor *vs.* McVeigh, 93rd U. S. Rep., p. 282.) (Nulton *vs.* Isaacs, 30th Gratt., p. 740; Thomas *vs.* Morgan, 79 Virginia Rep., 367.)

The supreme court of appeals of Virginia, it is submitted therefore, erred in any possible aspect of the case.

Wherefore this appellant prays that the decree of said court may be reviewed, reversed, and annulled, and such decree made as to the court may seem just.

And he will ever pray, &c.

JOHN K. WHITE,
By Counsel.

JOHN E. ROLLER,
For Appellant.

* * * * * * *

And at another day, to wit:

At a supreme court of appeals held at the State court-house, in the city of Richmond, on Saturday, the 5th of January, 1895.

This day came the appellees, by counsel, and presented to the court a petition to set aside the decree pronounced herein on the 21st day of December, 1894, and to grant a rehearing of the cause, and, the court not being advised of its decree to be pronounced in the premises, time is taken to consider thereof.

And at another day, to wit:

Friday, January 25th, 1895.

On mature consideration of the petition of the appellees to set aside the decree pronounced herein on the 21st day of December, 1894, and to grant a rehearing of this cause, and one of the judges who decided the cause adversely to said appellees having certified that, in his opinion, there is good cause for such rehearing, it is ordered that said decree be set aside and a rehearing granted; and thereupon, for reasons appearing to the court, it is ordered that this cause be placed at the foot of the privileged docket.

And at another date, to wit:

Tuesday, March 26, 1895.

This cause was this day fully heard upon the transcript of the record of the decree aforesaid and arguments of counsel; but because the court here is not yet advised of its decree to be pronounced in the premises, time is taken to consider thereof.

* * * * * * *

JAMES H. McKENNEY

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1895.

No 703.

JOHN K. WHITE, PLAINTIFF IN ERROR,

vs.

NICHOLAS LENNIG AND JOHN B. LENNIG,
EXECUTORS OF CHARLES LENNIG, DECEASED.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF

On Motion to Dismiss for Want of Jurisdiction.

HOLMES CONRAD,
ED. S. CONRAD,
Counsel for Defendant in Error.

And at another day, to wit:

At a supreme court of appeals held at the State court-house, in the city of Richmond, on Saturday, the 5th of January, 1895.

This day came the appellees, by counsel, and presented to the court a petition to set aside the decree pronounced herein on the 21st day of December, 1894, and to grant a rehearing of the cause, and, the court not being advised of its decree to be pronounced in the premises, time is taken to consider thereof.

And at another day, to wit:

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On mature consideration of the petition of the appellees to set aside the decree pronounced herein on the 21st day of December, 1894, and to grant a rehearing of this cause, and one of the judges who decided the cause adversely to said appellees having certified that, in his opinion, there is good cause for such rehearing, it is ordered that said decree be set aside and a rehearing granted; and thereupon, for reasons appearing to the court, it is ordered that this cause be placed at the foot of the privileged docket.

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Office Supreme Court U. S.
FILED.
JAN 28 1896
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1895.

No. 708.

JOHN K. WHITE, PLAINTIFF IN ERROR,

vs.

NICHOLAS LENNIG AND JOHN B. LENNIG,
EXECUTORS OF CHARLES LENNIG, DECEASED.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF

On Motion to Dismiss for Want of Jurisdiction.

HOLMES CONRAD,
ED. S. CONRAD,
Counsel for Defendant in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1895.

No 708.

JOHN K. WHITE, PLAINTIFF IN ERROR,

vs.

NICHOLAS LENNIG AND JOHN B. LENNIG,
EXECUTORS OF CHARLES LENNIG, DECEASED.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF

On Motion to Dismiss for Want of Jurisdiction.

In order to give this court jurisdiction, it is not only necessary that a Federal question should have been presented, and decided by the State Court, but it is also necessary that the fact should appear upon the *face of the record*.

In Boughton vs Bank, 14 Otto. 427, it was held, that to give this court jurisdiction to review a judgment of a state court, the record must show affirmatively or by fair implication, 1st, that some Federal question was necessary to the determination of the case ; 2nd, that it is incumbent on the plaintiff in error to show by the record that the ground of the decision below was some wrong determination of a Federal question.

In Moor vs. Mississippi, 21 Wall, 636, it is said—

> If the record shows upon its face that a Federal question was not necessarily involved, and does not show that one was raised, we will not go outside of it to the opinion or elsewhere to ascertain whether one was in fact decided.

In Powell vs. Board Supervisors Brunswick County 150 U. S., 433—

> A *definite issue* as to the validity of the statute or the posession of the right must be distinctly deducible from the record before the state court can be held to have dispossed of such a Federal question by its decrees.
>
> It must be set up at the proper time and the proper way. Brooks *ex.* Missouri 124, U. S. 394.

This record does not show that a Federal question was raised, determined, or was necessary for the decision of the case.

The constitutionality of no law, State or Federal, was presented for decision by the bill, or put in issue by the answer.

After admitting a sale of the land in controversy by Scott, the marshall, as delinquent for the nonpayment of the U. S. Direct Land Tax, and a deed by Scott, the marshall to Gambill, the purchaser, the complainant says that he is informed and believes that "these tax sales and deeds have been held to be illegal and invalid so often and uniformly by the court as scarcely to constitute them sufficiently strong to make even a color of title to any lands referred to in them." *Why* he does not say, but the cases in which such titles have been involved show that it has been because of failure to comply with some of the formalities of the statutes under which the tax was levied or the sale made.

"That as he avers in this case the sale and deed

> aforesaid were had and made *without the formalities* required by law as the property of John Berkeley not Barclay, under a law itself unconstitutional and void, the same and all deeds made in pursuance of and under said sale and deed must be set aside, cancelled and annulled.

Now what was the question presented—that the deed must be set aside and annulled because—

(1st.) made without the formalities required by law? or—

(2nd) because it was sold as "the property of John Berkeley not Barclay?" or—

(3rd,) because the law was unconstitutional?

If the last, what law? and in what respect?

The answer says that all of the provisions and requirements of the Acts of Congress under which the land was sold were complied with, and distinctly sets up the main ground of defence (p. 6) that of adversary possession for more than the statutory period. The constitutionality of the Act of Congress was neither affirmed nor denied – it was not made an issue by the pleadings. The record shows that the main issue was that of the defendants' adverse possession.

In addition to the forfeiture for unpaid tax to the United States, the answer alleges forfeiture for delinquent State taxes. There was no replication putting in issue the constitutionality of the Virginia statutes. There was no "definite issue as to the validity of a statute." If there was any question raised it was not as to the validity of the statute, but merely as to the application of the statute to the case, and hence no Federal question arose. Cameron vs. United States, 146 U. S., 533.

In Ansbro vs. U. S., decided Dec. 2, 1895, it is said

> And it is only when the constitutionality of a law of the United States is drawn in question, *not*

> *incidentally* but necessarily and directly, that our jurisdiction can be invoked for that reason,—
>
> citing Borgmeyer vs. Idler, Carey vs. Huston & T. C. R. Co., 150 U. S., 170 and others.

Not only is it necessary that the record show upon its face that a Federal question was raised and decided, but as well that the decision was necessary to the determination of the cause or that the judgment as rendered could not have been given without deciding it. Brown vs. Atwell 92 U. S. 327. Louisiana vs. Louisiana 96 U. S. 140, Bolling vs. Lersner 1 Otto 594.

In Rutland R. Co. vs. Central Vermont R. Co. (decided Nov. 16, 1895, reported in Lawyers Co operative Advance sheets Dec. 5, 1895) it was said by Justice Gray,

> It is well settled by a long series of decisions of this court that when the highest court of a state, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground not involved in a Federal question and broad enough to support the judgment, the writ of error will be dismissed without considering the Federal question," citing a number of of Supreme Court decisions.

So in Kenebec & Portland R. R. Co. vs. Portland & Kenebec R. R. Co. 14 Wall 23,—

> The court will not entertain jurisdiction of State judgments where beside the Federal question decided by the State Court there is another and distinct ground on which the judgment can be sustained.

It is manifest from the opinion of the Supreme Court of Va., that the question as to the constitutionality of the Act of Congress was not regarded as an essential one, and not considered by the court.

Near the bottom of page 26 "Extracts from the

record," the Court speaking of the plaintiff says,

> And now come admitting the sale of the land as delinquent, admitting the sale and conveyance by Scott, the Marshal, to Gambill and tracing by a regular succession of conveyances the title down to Charles Lennig, the testator of the appellants, and *only assail the title thus derived by alleging in their bill in a general way, without specifying any particulars, that the United States Marshal did not comply with the law in making said sale, and that therefore the said sale and conveyances as well as all other conveyances* and devises constituting links in said chain of title, are invalid and void.

The whole opinion shows that the cause was determined on the merits of the defense of adverse possession.

On page 29 the Court says,—

> The argument has proceeded almost entirely upon the law applicable to an adversary possession.

The Court decided that the deed from the marshal constituted color of title, and that under that title Chas. Lennig, and those under whom he claims had had such adversary possession for more than the statutory period, that it ripened into a good and perfect title.

Nor have the appellants here been deprived of their property without due process of law.

The parties were all before the court, and were fully heard in the regular course of judicial proceedings by a court having jurisdiction of the subject matter, and however erroneous that decision may have been, it does not deprive him of his property without due process of law, and this court will not on that ground entertain the appeal. See Central Land Co. vs. Laidley—near close of opinion—decided June 3, 1895, by this court,

and cases there cited. (Reported in Advance sheets of Co. Op. edition Dec. 2, 1895, p 49, &c.

The first question presented in Appellant's brief (p. 5) is whether or not the forfeiture laws are constitutional.

It is sufficient to refer to what has already been said, that the record shows that these laws *were not put in issue* by the pleading. It was not referred to in the bill. The answer to the bill introduced it as new matter. There was no replication denying their constitutionality.

The point made by appellant in his brief, page 5, (which is directly opposite the position taken by him below) that the Supreme Court of Virginia had no jurisdiction to pass upon the rights of the adverse claimants in a suit in equity, and that this is a Federal question, is clearly without merit. This court has repeatedly held that the decisions of a state court upon its own statutes will not be reviewed by this court.

Styker vs. Goodnow, 123 U. S., 527.
Halstead vs. Buster, 140 U. S., 273.
Gormley vs. Clark, 134 U. S., 338.

The Circuit and Supreme Court of the State of Virginia held that they did have jurisdiction under the statute. It was a question of pleading under the State statute and having been construed by the courts of the state to give jurisdiction, whether right or wrong, it raises no Federal question and this court will not review it.

Replying to the proposition that a Federal question was decided and was of such relative importance as to control the whole case.

This Court will not disturb or review the decision

of the State Court upon a question of fact. The controlling influence is to be found in Judge Richardson's opinion (p. 26) as follows,—

> For all this period the public records of Rockingham County, where most of the land in controversy is situated, have teemed with evidence of the claim asserted by the testator of the plaintiff and those under whom he claimed and during all which time they have exclusively occupied, used and enjoyed the premises without interruption, as evidenced by their continued, open, notorious, and habitual acts of ownership, quite equivalent in import and effect to occupation, use and enjoyment evidenced by residence, cultivation and improvement.

See also conclusion of this opinion on pages 29-30.

Respectfully submitted,

HOLMES CONRAD,

ED. S. CONRAD,

Counsel for Defendant in Error.

JAN 10 1896
JAMES H. MCKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 708.

JOHN K. WHITE, PLAINTIFF IN ERROR,

vs.

NICHOLAS LENNIG AND JOHN B. LENNIG, EXECUTORS OF CHARLES LENNIG, DECEASED.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF

On Motion to Dismiss for Want of Jurisdiction.

HOLMES CONRAD,
E. S. CONRAD,
Counsel for Defendants in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 708.

JOHN K. WHITE, PLAINTIFF IN ERROR,

vs.

NICHOLAS LENNIG AND JOHN B. LENNIG, EXECUTORS OF CHARLES LENNIG, DECEASED.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF

On Motion to Dismiss for Want of Jurisdiction.

This is a motion to dismiss the writ of error heretofore awarded to a judgment and decree of the supreme court of appeals of Virginia, on the ground that no Federal question was presented for decision to that court; that if such question was presented, yet was its decision not necessary to the determination of the case; that such question was not decided by that court in that case, but that this case was decided upon other and wholly different and independent grounds not involving a Federal question.

THE CASE.

The bill was filed by John K. White on the 24th day of May, 1890, and states the following:

1. That by patent from the Commonwealth of Virginia dated the 5th day of March, 1796, ninety-three thousand acres of land were granted to John Barclay.

2. That Barclay died many years ago intestate, leaving issue to whom his real estate descended.

3. That of these descendants, in a later generation, was Harriet Biddle, who married one De Grasse Fox, and De Grasse Fox and Harriet, his wife, by deed dated May 6, 1890, granted their interest in said land to John K. White, who is complainant here.

4. That complainant finds that by deed of March 6, 1890, Charles Lennig had sold to the Houck Tanning Company the tan bark on said land, and that the purchaser had entered and was cutting the timber, and thereby doing irreparable damage to the freehold.

5. That said Charles Lennig claimed in his conveyance to the tanning company to have acquired said land from the heirs of Augustus Waterman, deceased, by whom it was derived through Henry J. Gambill—

> who bought the whole of said tract of land for the sum of eight dollars and nine cents from Joseph Scott, marshal of the district of Virginia, under a sale made of the same as the property of John Berkeley, not Barclay, as delinquent for the non-payment of the United States direct land tax, and received a deed therefor.
>
> That, as your complainant is informed and believes, these tax sales and deeds have been held to be illegal and invalid so often and so uniformly by the court as

scarcely to constitute them sufficiently strong to make even a color of title to any lands referred to in them; that, as he avers in this case, the sale and deed aforesaid were had and made without the formalities required by law as the property of John Berkeley, not Barclay, under a law itself unconstitutional and void, the same and all deeds made in pursuance of and under said sale and deed must be set aside, cancelled, and annulled.

6. That the deeds under which Charles Lennig claimed title to said land were as follows:

1. Deed from Joseph Scott, marshal, to H. J. Gambill, dated June 1, 1806, recorded December, 1806.

2. Deed from W. J. Gambill and wife to Asher Waterman, dated December 16, 1806, recorded December 16, 1806.

3. Deed from Asher Waterman's heirs to Augustus Waterman, dated June 8, 1827, recorded June 8, 1827.

4. Deed from Augustus Waterman's devisees to Charles Lennig, dated July 9, 1859, recorded July 9, 1859.

All these deeds are deeds of special warranty.

Very many grants of different interests in and to this land have been made by Lennig and those claiming under him.

7. The bill makes as defendants all of the known heirs-at-law of John Barclay, deceased, except complainant Charles Lennig, the members of the tanning company, and others, and prays that they be required to answer, but waives answer under oath. It prays an injunction to restrain waste, and "that the court may take cognizance of the various questions presented in this bill affecting the legal title to said tract of land, and that after these are determined that there may be a partition of the same."

Charles Lennig's executors demur to the bill and, subject to the demurrer, answer the same as follows:

1. They admit the patent from the governor of Virginia.

2. They do not admit that the persons named in the bill are the heirs-at-law of John Barclay.

3. They deny that John Barclay or any of his heirs are entitled to any right, title, or interest in the land, but aver that they, respondents, are the owners.

4. They recite the chain of title under which Charles Lennig held the land.

> And respondents, further answering, say that their testator and those through whom he claimed have been in actual possession and ownership of the said land for nearly a century under and by virtue of the said conveyances, &c.

That no one has ever questioned the validity of their title until this suit was brought, and there is no just ground for it now.

It appears that the only reference made in the bill, where complainant's case is fully stated, to any facts on which a Federal question could be raised is in the charge that Henry J. Gambill bought the whole of said tract of land for the sum of eight dollars and nine cents from Joseph Scott, marshal of the district of Virginia, under a sale made of the same as the property of John Berkeley, not Barclay, delinquent, for the non-payment of the United States direct land tax, and received a deed therefor; that, as your complainant is informed and believes, these tax sales and deeds have been held to be illegal and invalid so often—

> and so uniformly by the court as scarcely to constitute them sufficiently strong to make even a color of title to any lands referred to in them; that, as he avers in this case, the sale and deed aforesaid were had and made without the formalities required by law as the property of John Berkeley, not Barclay, under a law itself unconstitutional and void, the same and all deeds made in pursuance of and under said sale and deed must be set aside, cancelled, and annulled.

No further reference is made in the bill to the "Federal question," and in the prayer for relief nothing whatever is asked on that score.

In the answer of Lennig's executors the sale of the land by the United States marshal is admitted, and its validity insisted on only so far as—

> That all of the provisions and requirements of the act of Congress of the United States under which the land was sold was fully complied with.

But the real defense to the case stated in the bill is put upon the distinct ground that—

> Their testator and those through whom he claimed have been in undisputed actual possession and ownership of the said land for nearly a century, under and by virtue of the said conveyances, &c., &c.; that no one has ever questioned the validity of their title until this suit was brought, and there is no just ground for it now; that for nearly a century they have had open, notorious possession, adverse to the complainants and the rest of the world; * * * that the said John Barclay also forfeited his title to the said land by failure *to pay taxes due the Commonwealth of Virginia*; * * * that the said John Barclay nor any one for him ever redeemed the lands after they were forfeited, so that the chain of title claimed by the complainants from the Commonwealth of Virginia is broken and forfeited and he has no title whatever.

The *opinion of the supreme court of appeals of Virginia*, after reciting the pleadings and referring to the evidence, says (page 17):

> By virtue of the tax sale made by the United States marshal in 1806 to H. J. Gambill of the tract of land in controversy, his conveyance thereof to said purchaser, the successive conveyances thereof down to that to the testator of appellants, and the open, notorious, and habitual acts of ownership by the said successive alienees, under, to say the least, colorable title for nearly a

> century, and the palpable acquiescence therein by John Barclay during his life and by his heirs since his death, *has ripened the title* so acquired and transmitted into a perfect title that cannot in any way be affected by the claim asserted by the appellee or by those under whom he claims.

And again, on page 19, after referring to the evidence—

> And can it be said that these numerous evidences of continuous occupation, use, and enjoyment for near ninety years—these continuous, open, notorious, and habitual acts of ownership under a continuous claim of ownership—are not in every respect fully equivalent to an adversary possession, evidenced by actual continuous residence, cultivation, and improvement? In the light of well-settled principles we think not.

And again, after referring to the failure to pay the United States direct tax—

> That it was not only delinquent and forfeited by reason of the non-payment of the United States direct tax lawfully charged thereon, but was delinquent and forfeited by reason of the non-payment of the taxes lawfully assessed thereon by the State from the year 1797 to the year 1806, inclusive, not one cent of which was ever paid; that since 1806 this land has never been on the land books in the name of John Barclay or of any one claiming under him, &c.

And again, on page 28:

> We do not assert the proposition that in the present case the marshal's deed is *prima facie* evidence of title, and while it may not be such, yet we do assert that it constitutes color of title under which the testator of the appellants and those under whom he claimed entered upon and enjoyed the premises, not by actual residence, cultivation, and improvement, but by "other open, notorious, and habitual acts of ownership," exercised continuously for the full period of the statutory bar, and has thereby ripened into a complete and perfect title.

And again, on page 26:

> Had John Barclay, during his lifetime, or those claiming under him since his death, come forward and asserted their rights in due time and form, they might have reclaimed this land which had been sold as delinquent for the non-payment of the United States direct taxes, lawfully charged thereon, but this manifest duty they failed to perform * * * and now come admitting the sale of the land as delinquent, admitting the sale and conveyance by Scott, marshal, to Gambill, and tracing by regular succession of conveyances the title down to Charles Lennig, the testator of the appellant, and only assailed the title thus derived by alleging in their bill in a general way, without specifying any particulars, that the United States marshal did not comply with the law in making said sale, and that therefore the said sale and conveyances as well as all other conveyances and devices, constituting links in said chain of title, are invalid and void.

The term of office of the judges constituting the court who decided this cause was about to expire when a petition to rehear the decree was filed. The cause was reheard by a court consisting of entire new members, who, on April —, 1895, concurred in the decree of their predecessors, but said, page 31:

> We do not wish to be understood as concurring in all the views which he (Judge Richardson) presents upon the several matters of law and fact discussed therein.

in passing as having been made "without the formalities required by law."

That deed, made in the year 1806, and the long line of successive conveyances which followed it, raised the only two real questions on which the case was decided by the State court, to wit, laches and the statute of limitations.

The answer expressly states these as the grounds of defense and relies on them alone.

If the decision of a Federal question is rendered unnecessary by the view the court takes of the rest of the case within the scope of the pleadings, the judgment is not open to review here.

Choteau *vs.* Gibson, 111 U. S., 200.
Adams County *vs.* B. & M. R. R. Co., 112 U. S., 127.
Chapman *vs.* Goodnow, 123 U. S., 548.
Eustis *vs.* Bolles, 150 U. S., 367.
Dessaussure *vs.* Gaillard, 127 U. S., 216.
Johnson *vs.* Risk, 137 U. S., 307.

III.

THE STATE COURT IN ITS FINAL DETERMINATION OF THIS CASE DID NOT DECIDE ANY FEDERAL QUESTIONS.

The extracts made above from the opinion of the supreme court of appeals of Virginia show beyond question that that court not only did not pass upon any Federal question, but expressly declare that they do not. On page 28 the court say:

> We do not assert the proposition that in the present case the marshal's deed is *prima facie* evidence of title; and while it may not be such, yet we do assert that it constitutes color of title under which the testator of the appellant and those under whom he claimed entered upon and enjoyed the premises, not by actual residence, cultivation, and improvement, but by "other open,

notorious, and habitual acts of ownership," exercised continuously for the full period of the statutory bar, and has thereby ripened into a complete and perfect title.

To give the Supreme Court of the United States jurisdiction by writ of error to the State court, it must appear affirmatively:

1. That a "Federal question" was presented for decision to the highest court of the State having jurisdiction.

2. That its decision was necessary to the determination of the case.

3. That the "Federal question" was actually decided by the court, and that the judgment as rendered could not have been given without deciding it.

Poydress *vs.* Louisiana, 18 How., 192.
Hoyt *vs.* Thompson, 1 Black, 518.
Taylor *vs.* Morton, 2 Black, 481.
Cockroft *vs.* Vose, 14 Wall., 5.
Smith *vs.* Adsit, 16 Wall., 189.
Murray *vs.* Charleston, 96 U. S., 442.
W. A. Wood, M. & M. R. M. Co. *vs.* Skinner, 139 U. S., 293.
Blount *vs.* Walker, 134 U. S., 607.

IV.

THAT IF A FEDERAL QUESTION HAD BEEN INVOLVED AND FAIRLY RAISED AND PRESENTED FOR DECISION IN THE PLEADINGS, YET IF ANY OTHER QUESTION, UPON WHICH THE CASE MIGHT PROPERLY HAVE BEEN DECIDED, WAS ALSO INVOLVED AND IT DID NOT APPEAR, OR WAS DOUBTFUL, UPON WHICH QUESTION THE CASE WAS FINALLY DETERMINED, THE DECREE OR JUDGMENT OF THE STATE COURT WILL NOT BE REVIEWED HERE.

It is quite evident, in the opinion of the court of appeals of Virginia, that other questions than the Federal question were involved in the determination of this case by that court. The questions of laches and of the statute of limitations were distinctly raised upon the pleadings, and upon either of these the case might have been, as indeed it was, decided.

The opinion of the court is authenticated here by the certificate of the clerk of that court and may be looked into to see what questions were presented, considered, and passed on by the court.

Murdock *vs.* City of Memphis, 20 Wall., 590.
Gross *vs.* U. S. M. Co., 108 U. S., 477.
Adams County *vs.* B. & M. R. R. Co., 112 U. S., 129.
P. F. & A. *vs.* New York, 119 U. S., 116.

If it appears from the opinion, or elsewhere from the record, that other questions than "Federal questions" were decided by the court and were sufficient to support the judgment, this Court will not regard or consider the Federal question.

Eustis *vs.* Bolles, 150 U. S., 361.
California Powder Works *vs.* Davis, 151 U. S., 393.
N. Y. & N. E. R. R. Co. *vs.* Woodruff, 153 U. S., 691.
Hammond *vs.* Conn. Mut. Ins. Co., 150 U. S., 633.
O'Neal *vs.* Vermont, 144 U. S., 335.
Henderson Bridge Co. *vs.* Henderson City, 141 U. S., 688.

On the whole case, then, as presented in the record, we submit that no "Federal question" was set up or claimed at the proper time, at the proper place, or in the proper way; that the decision of no "Federal question" was necessary to the proper determination of the case by the State court; that no "Federal question" was decided by the State court; that other questions than a "Federal question" were presented for decision upon which the State court might properly have determined the case; that the State court expressly declared that it did not decide the "Federal question;" that the State court did plainly and explicitly decide the case upon the questions of laches and the statute of limitations.

HOLMES CONRAD,
E. S. CONRAD,
Counsel for Defendants in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 708.

JOHN K. WHITE, PLAINTIFF IN ERROR,

vs.

NICHOLAS LENNIG AND JOHN B. LENNIG, EXECUTORS OF CHARLES LENNIG, DECEASED.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

AMENDED ASSIGNMENT OF ERRORS
AND
BRIEF ON MOTION TO DISMISS,
FOR PLAINTIFF IN ERROR.

JOHN E. ROLLER,
Counsel for Plaintiff in Error.

'REGISTER' PRINT, HARRISONBURG, VA.

IN THE

Supreme Court of the United States.

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IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

AMENDED

Assignment of Errors.

Upon an appeal from a decree of the Supreme Court of Virginia reversing a decree pronounced by the Circuit Court of Rockingham County, in said State, in favor of John K. White, appellant here, and dismissing his bill of complaint, with costs.

To the Honorable, the Judges of the Supreme Court of the United States:

The assignment of errors of John K. White respectfully sheweth—

1. That the said Supreme Court of Appeals of Virginia, in its decision and decree aforesaid, applied "to the title of John Barclay to these lands the forfeiture laws of the State of Virginia," and declared that this title "had become delinquent for the non-payment of taxes and was forfeited and was extinct;" "that these forfeiture laws were constitutional," and, "that no vestige of title remained in John Barclay or his heirs."

It is manifest from this language that the alleged forfeiture of the Barclay title was the controlling influence and consideration that determined the Court's decision against the appellant, White.

The decision of the Court upon the Federal question —the constitutionality of these forfeiture laws—was adverse to the appellant, White, and, it is submitted, was erroneous.

2. That while it is true that the said Supreme Court of Appeals of Virginia in its decision upon the rehearing rendered on the 4th day of April, 1895, did not say in their opinion whether they applied the forfeiture laws referred to, to these lands or not, it is plainly manifest that without the assumption or finding of such forfeiture its decision is indefensible, and should not be approved.

If it did not apply the forfeiture laws, to which reference has been made, the Court must have applied to these lands a forfeiture law of its own enacting, and erred in

so doing, its decision being in direct contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States, which forbids any State from making or enforcing any law to deprive any person of life, liberty, or property without due process of law, which is but a re-enactment in the form of a constitutional protection of the principles of the Great Charter.

3. That the said Supreme Court of Appeals of Virginia erred in assuming jurisdiction in a suit for partition of land in Courts of Chancery, and that, too, without an opportunity for a trial by jury, of the determination of the rights of adverse claimants to such land, and in so doing acted in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States, which forbids any State from making or enforcing any law to deprive any person of life, liberty, or property, without due process of law.

Wherefore this appellant prays that the decree of said Court may be reviewed, reversed and annulled, and such decree made as to the Court may seem just.

And he will ever pray, &c.

JOHN K. WHITE,

By Counsel.

John E. Roller,

For Appellant.

IN THE

Supreme Court of the United States.

CHARLES LENNIG'S EX'ORS, *Appellants*,

vs.

JOHN K. WHITE AND OTHERS, *Appellees*.

BRIEF

On Motion to Dismiss for Want of Jurisdiction.

FOR PLAINTIFF IN ERROR.

The attention of the Court is called to the fact that the extracts from the record which have been printed by the defendants in error *were wholly insufficient to present the case to the Court*, and that the plaintiff in error has had additional extracts from the record printed, and asks that the same be read upon the hearing of this motion.

The Court will note also, that the brief for defendants in error, wholly mistakes the Federal questions presented by the record. The motion to dismiss is based upon a singular misconception of the questions involved.

involved are those presented in the assignment of errors filed with the record by the plaintiff in error, and now printed for the hearing of this motion.

I.

The first Federal question presented by the record, is, *whether the forfeiture laws of Virginia*, to which reference is made in the opinion of the State Court, *are constitutional or not? Whether they can or do operate proprio vigore, without a hearing, without an inquest, or judgment or decree, or other matter of record*, as that Court, in its opinion, says *they can and do.*

In addition to the discussion of this question in the assignment of errors, and to the authorities cited therein, reference is now made to one additional authority, a recent work—Black on Constitutional Law, p. 421. This, the latest writer, upon the subject, says:

> "While property may be forfeited to the State "for default in the payment of taxes duly assessed "upon it, yet it is not competent by such a proceeding "to vest in the State an absolute and indefeasible "title, unless the owner shall have been afforded an "opportunity to appear and be heard before some "tribunal or board, empowered to grant relief, and to "make good any defences which he may have against "the legality of the tax or the liability of his estate "therefor."

This Federal question is of far-reaching importance.

II.

Another Federal question arises from the fact, that since the decision by the Court of Appeals of Virginia, of this case, that Court has unanimously held, that under

the true construction of the Virginia statute for the partition of land, cited in the assignment of errors, a Court of Chancery is wholly without jurisdiction to take cognizance of any questions affecting the rights of adverse claimants. It has thus expressed its opinion upon the question in a decision rendered on the 26th of September, 1895 :

> "Of course a partition suit cannot be made a "substitute for an action of ejectment; and if the de- "fendant in such suit does not claim under anyone "who was a joint owner, such as a co-parcener, joint "tenant, or tenant in common, with the complainant, "or those under whom he claims, then it is clear that "such suit would not be proper."
>
> See Pillow *vs.* Southwest Virginia Improvement Company, 1 Virginia Law Register, page 666.

In the case at bar that Court undertook to decide, and did decide, as between White, the plaintiff in error, and the tenant in common with the heirs of Barclay on the one side, and Lennig, who did not claim under any of them, but adversely to all, on the other, and to dismiss the bill filed by White, *absolutely and without qualification.*

The important question presented, is whether that Court had the "power within its jurisdiction" thus to decide the case, and apply either the Virginia statute laws of forfeiture, or forfeiture laws of its own enacting to the lands in controversy, and thus deprive the plaintiff in error, of his interest in them, or not.

The State Court, while Judge Richardson was upon the bench, not only took jurisdiction of the case, but applied certain Virginia Statutes for the forfeiting of lands for the non-payment of taxes, which, in plain terms, only applied to lands lying west of the Alleghany Moun-

tains, while these lands lie a whole tier of counties east of those mountains.

The same Court delivering its opinion, while Judge Keith was upon the bench, does not say, whether they applied these forfeiture laws or not, but it holds to its assertion of jurisdiction and declared that the former decision was right.

It is earnestly submitted that it is manifest that the conclusion that "*the title of the heirs of Barclay*" to the lands in question "*was forfeited and extinct*" and "*the land vacant and in the possession of no one*," was the controlling influence in the decision of that Court, and that without such conclusion, it is indefensible.

It would be a manifest tergiversation—it would be a gross inconsistency, one without palliation or excuse to the ordinary mind—on the part of that Court—first, to rest its decision and opinion upon the forfeiture laws, whose validity could be enquired of in this Court, and then to conceal its opinion upon a rehearing behind a failure to assign any reasons for its conclusions.

Had the State Court the power to declare against the lands of the Barclays, a forfeiture of its own creation and do this, too, in a case in which it was without jurisdiction? If it had not, can not the constitutional limitation, as to "due process," be invoked against its action?

Judge Cooley declares that—

> "Individual citizens require protection against "judicial action as well as against legislative, and "perhaps the question what constitutes due process "of law arises as often where judicial action is in "question as in any other cases."

"Jurisdiction is, *first*, of the subject matter; "and, *second*, of the persons whose rights are to be "passed upon."

"A Court has jurisdiction of any subject matter, "if, by the law of its organization, it has authority "to take cognizance of, try and determine cases of "that description. If it assumes to act in a case over "which the law does not give it authority, the pro- "ceeding and judgment will be altogether void, and "rights of property cannot be divested by means of "them."

Cooley on Constitutional Law, P. 491.

"*Due process* of law in judicial action implies a "regular proceeding before a competent Court, *pos- "sessing jurisdiction*, with an opportunity to the "party to appear and be heard in his own defence, or "in rebuttal of the claim against his property."

Black's Constitutional Law, *P.* 424.

"The validity of judicial action as tested by this "requirement of the Constitution is primarily de- "pendent upon jurisdiction. Jurisdiction naturally "divides itself into three heads. In order to the "validity of a judgment, the Court must have juris- "diction of the persons, of the subject matter, and "of *the particular question which it assumes to "decide*. It cannot act upon persons who are not "legally before it, and *it cannot adjudicate upon a "subject which does not fall within its province as "defined or limited by law*."

Black's Constitutional Law, P. 425.

The design of the Constitution is, "to exclude arbitrary power from every branch of the Government."

This Court has said in its opinion in—

Windsor *vs.* McVeigh, 93 U.S. Rep., P. 282, (282):

"All Courts, even the highest, are more or less "limited in their jurisdiction; they are limited to "particular classes of actions, such as civil or com- "mercial; or to particular modes of administering "relief, such as *legal or equitable;* or to transactions "of a special character, such as arise on navigable "waters, or relate to the testamentary disposition of "estates, or to the use of particular process in the "enforcement of their judgments." "Though the "Court may possess jurisdiction of a cause, of the "subject matter, and of the parties, it is still limited "in its *mode of procedure*, and in the *extent and "character of its judgments.* It must act *judicially* "in all things, and cannot then *transcend the power "conferred by the law.*"

"So a departure from established modes of pro- "cedure will often render the judgment void." "The "*decree of a Court of Equity*, upon *oral allegations*, "*without written pleadings*, would be *an idle act "and without any force.*"

"The doctrine that a Court has a right to decide "every question after acquiring jurisdiction of the "cause is only correct, *when it proceeds, according "to the established modes governing the class to "which the case belongs, and does not transcend in "the extent or character of its judgment the law "which is applicable to it.*"

Same Case, Page 283.

If ever the question, whether a State Court had transcended its powers, was presented to this Court in any cause, it is presented in this case, in which—as is submitted—a Court of Equity has not only transcended the jurisdiction conferred upon it by law, but has wrought a forfeiture of its own enacting, without process, and without an inquest, or judgment, or decree or other matter of record. It not only exceeded its jurisdiction, but its

action in the case was arbitrary, and partial, and, it is submitted, cannot be sustained.

The opinion of the Court—ARBITRARY AND UNJUST BEYOND MEASURE—is a travesty upon judicial action.

III.

These Federal questions are properly presented in the record.

The opinion of the Court is made part of the record by Rule 8 and may be looked into, to see what questions were passed upon.

See Sayward *vs.* Denny, 158 U. S., 183.
Murdock *vs.* City of Memphis, 20 Wall. 590.
Gross *vs.* U. S. M. Co., 108 U. S., 477.
Adams County *vs.* B & M. R. R. Co., 112 U. S., 129.
P. F. & A. *vs.* New York, 119 U. S., 116.

IV.

Was the decision of the Federal question necessary to the determination of the case?

It is admitted that to give this Court jurisdiction upon a writ of error to a State Court, it must appear, not only that the Federal question was presented for decision, but that its decision was necessary to the determination of the cause, and THAT IT WAS ACTUALLY DECIDED.

See Walter A. Wood Co. *vs.* Skinner, 139 U. S., 293.
Cook County *vs.* Calumet & Chicago Canal Co., 138 U. S., 635.
DeSaussure *vs.* Gaillaird, 127 U. S., 216.

Of course if the decision of the Federal question was not necessary in determining the rights of the parties, jurisdiction does not exist in this Court.

See McManus *vs.* Sullivan, 91 U. S. Rep., 578,
Brown *vs.* Atwell, 92 U. S., 321.

The Federal question in this case was certainly decided by the State Court, and it was surely necessary for the decision that was made.

It is admitted, also—

"that if the State Court proceeded upon other and "distinct grounds, not involving a Federal question, "and SUFFICIENT WITHIN ITSELF, to maintain the "judgment, independent of the Federal question, it "will be affirmed here."

Beaupre *vs.* Noyes, 138 U. S., 397.

But it is also true, that after earnest consideration, it has been held by this Court that—

"If it be found that the issue raised by the ques- "tion of Federal law is of SUCH CONTROLLING CHAR- "ACTER, *that its correct decision is necessary* to any "final judgment in the case, or that there has been "no decision by the State Court of any other matter "or issue which is *sufficient to maintain the judgment "of that Court*, WITHOUT REGARD TO THE FEDERAL "QUESTION, then this Court will reverse the judgment "of the State Court, and will either render such "judgment here as the State Court should have "rendered or remand the case to that Court, as the "circumstances of the case may require."

Phillips Supreme Court Practice, P. 189.
Murdock *vs.* Memphis, 20 Wall., P. 591.
Eustis *vs.* Balles, 150 U. S., P. 366.

In Murdock *vs.* Memphis, 20 Wallace, P. 632, this Court declared that by the very terms of the statute—Act of 1867—when this Court

"is of opinion that *the question of Federal law is of "such relative importance to the whole case* that *it "should control the final judgment*, it is authorized "to render such judgment and enforce it by its own "process."

The test is, if this Court reverse the judgment upon the Federal question, is there any other upon which the State Court has decided the case, upon which in the end it must be affirmed in this Court?

1. Upon the question presented in this cause as to the invalidity and illegality of a decree in a Court of Chancery outside of and beyond its jurisdiction, the State Court would—under its own ruling, that a Court of Equity is without jurisdiction in such cases—now have to concur in the order of reversal. Upon this question alone the decree of the State Court, it is submitted, must be reversed, and that Court could not help but concur in such an order.

2. Upon the question presented by the defence of adverse possession, it would also have to concur in any order of reversal made here upon the Federal question, since that Court has itself conceded that there was no "*actual*" adverse possession, such as is required by the law of the land to sustain that defence, but mere "acts of ownership" held to be sufficient only because of the alleged forfeiture of the Barclay title, and by reason thereof, the land was vacant and in the possession of no one.

3. Upon the question of the validity of the defence, based upon the tax deed to Gambill, it would also have to concur in any reversal here, since that Court in its opinion has declared that this tax deed is not even prima

facie evidence of title, but that it constituted color of title which had been ripened into a good title—not by "*actual*" possession, but by "*acts of ownership*," which it had held, and could only hold under the decisions of the Courts of that State and of this Court—to be *sufficient* to constitute *adverse possession*, *because* of the alleged *forfeiture* of the Barclay title and the vacant possession already referred to.

In fine, the defense of adverse possession was *only sustained* by reason of the forfeiture which the State Court declared and enforced. The defence under the tax deed was only sustained because of the same defense of adverse possession, which was, as we have seen, only applicable because of this alleged forfeiture. There cannot be a shadow of doubt, then, but that the question of forfeiture was of "SUCH RELATIVE IMPORTANCE TO THE WHOLE CASE" that it controlled the final judgment.

If it was not, then no case will ever arise in which the Federal question is of "*such relative importance.*"

JOHN E. ROLLER,
Counsel for Plaintiff in Error.